

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit

FILED JUN 3 1957

Joseph W. Stewart
CLERK

No. 13, 686

GRANT T. MARTIN

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee

686

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

J. LEON WILLIAMS
2000 9th Street, N. W.
Washington, D. C.

John A. SHORTER, JR.
508 Fifth Street, N. W.
Washington, D. C.

Counsel for Appellant

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding A Criminal Term

Grand Jury Impanelled March 31, 1955, Sworn in on April 5, 1955

FILED IN OPEN COURT
June 6, 1955
HARRY M. HULL, CLERK

UNITED STATES OF AMERICA	:	Criminal No. 544-55
	:	Grand Jury No. 422-55
vs.	:	Vio. 26 U.S.C. 4704a, 4703a
	:	21 U.S.C. 174
GRANT T. MARTIN	:	

THE GRAND JURY CHARGES:

R. P. 5

On or about March 29, 1955, within the District of Columbia, Grant T. Martin did sell, barter, exchange and give away to Clifton Reeder a narcotic drug, that is, 100 capsules containing a mixture totaling about 97.2 grains of heroin hydrochloride, quinine hydrochloride and sucaryl, not in pursuance of a written order, written for that purpose, from the said Clifton Reeder, as provided by law.

SECOND COUNT:

On or about March 29, 1955, within the District of Columbia, Grant T. Martin purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, 100 capsules containing a mixture totaling about 97.2 grains of heroin hydrochloride, quinine hydrochloride and sucaryl. This is the same heroin hydrochloride which is mentioned in the first count of this indictment.

THIRD COUNT:

✓ On or about March 29, 1955, within the District of Columbia, Grant T. Martin facilitated the concealment and sale of a narcotic drug, that is, 100 capsules containing a mixture totaling about 97.2 grains of heroin hydrochloride, quinine hydrochloride and sucaryl, after the said heroin hydrochloride had been imported, with the

knowledge of Grant T. Martin, into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the first and second counts of this indictment. /x

FOURTH COUNT:

R. P. 6

On or about March 29, 1955, within the District of Columbia, Grant T. Martin purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, one bag containing a mixture totaling about 299.6 grains of heroin hydrochloride, quinine hydrochloride and sucaryl.

FIFTH COUNT:

/ On or about March 29, 1955, within the District of Columbia, Grant T. Martin facilitated the concealment and sale of a narcotic drug, that is, one bag containing a mixture totaling about 299.6 grains of heroin hydrochloride, quinine hydrochloride and sucaryl, after the said heroin hydrochloride had been imported, with the knowledge of Grant T. Martin, into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the fourth count of this indictment. /y

A TRUE BILL

Foreman

Attorney of the United States in
and for the District of Columbia

United States District Court for the District of Columbia

Filed
Dec. 1, 1955
Harry M. Hull, Clerk

UNITED STATES

vs.

Grant Martin

Defendant

CRIMINAL No. 544-55

CHARGE Violation of Section 4704a,
4705a, Title 26, U. S. Code and
Section 174, Title 21, U. S. Code.

On this 1st day of December, 1955, came the attorney of the United States; the defendant in proper person and by his attorney William A. Tinney, Esquire; whereupon the jurors of the regular Petit Jury panel serving in Criminal Court No. 4 & 6, being called, are sworn upon their voir dire; and thereupon comes a jury of good and lawful persons of the District of Columbia, to-wit:

- | | |
|---------------------------|----------------------------|
| 1. Charles G. Borge | 7. Warren A. Peterman |
| 2. Bessie E. Clarke | 8. Gaylyn I. Price |
| 3. Duval H. Seaton | 9. Rose Rehberg |
| 4. Thelma S. Heineman | 10. Elbert F. Hawley |
| 5. Sara H. Janof | 11. Lucille J. B. Robinson |
| 6. Hernandez A. Lamberton | 12. Herbert H. Schosnig |

who are sworn to well and truly try the issue joined herein; whereupon the Court directs the calling of two additional persons to serve as alternate jurors and Fau F. Hunter and Alfred Koster, being called, are sworn to well and truly try the issue joined herein; and thereupon, after having heard the evidence, the two alternate jurors are discharged and the jury retires to consider their verdict; the jury returns into Court and upon their oath say that the defendant is guilty on Counts One, Two, Three and Five. The case is referred to the Probation Office of the Court and the defendant is committed to the District of Columbia Jail.

By direction of

RICHMOND B. KEECH
Presiding Judge
Criminal Court # 4

HARRY M. HULL, Clerk

Present:

United States Attorney

By Arthur McLaughlin
Assistant United States Attorney

By /s/
Deputy Clerk

Roger E. Faye
Official Reporter

R. P. 9

United States District Court
FOR THE DISTRICT OF COLUMBIA

UNITED STATES

vs.

Grant T. Martin

Defendant

Filed
Dec. 1, 1955
Harry M. Hull, Clerk

Criminal No. 54-55

On this 1st day of December, 1955, came the attorney of the United States; the defendant in proper person and by his attorney, William A. Timney, Esquire; and upon consideration of the government's oral motion for leave to dismiss Count Four of the indictment in the above entitled case, it is ordered that leave to dismiss Count Four of _____ the indictment be and the same is hereby granted.

Whereupon the United States Attorney dismisses Count Four of _____ the above entitled case in open Court.

BY DIRECTION OF:

Present:

RICHMOND B. KETCH

Presiding Judge

United States Attorney

Criminal Court # _____

By: Arthur McLaughlin
Assistant U. S. Attorney

HARRY M. HULL, Clerk

Roger E. Evans
Official Reporter

By: /s/ Deputy Clerk

R. P. 10

United States District Court

FOR THE

District of Columbia

United States of America

v.

Grant T. Martin

Filed

Dec. 29, 1955

Harry M. Hall, Clerk

No. Criminal
544-55

On this 23rd day of December, 1955 came the attorney for the government and the defendant appeared in person and¹ by counsel, William A. Tinney, Esquire.

It IS ADJUDGED that the defendant has been convicted upon his plea of² not guilty, and a verdict of guilty of the offense of

Violation of Section 4704a, 4705a, Title 26, U. S. Code
Violation of Section 174, Title 21, U. S. Code

as charged³ in Counts 1, 2, 3, and 5 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It IS ADJUDGED that the defendant is guilty as charged and convicted.

It IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of⁴

Twenty (20) Months to Sixty (60) Months and pay a fine of One Hundred Dollars (\$100.00) on each of counts one, two, and three; said sentence by the counts to run concurrently; Eight (8) Months to Twenty-four (24) Months and pay a fine of One Hundred Dollars (\$100.00) on count five; said sentence to take effect at the expiration of the sentence imposed on Count One, Two, and Three.

It IS ADJUDGED that⁵ the payment of the fines be and is hereby suspended.

It IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/

United States District Judge.

~~THE COURT RECOMMENDS COMMITMENT TO~~

Clerk.

¹ Insert "by counsel" or "without counsel"; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel. ² Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. ³ Insert "in count(s) number" if required. ⁴ Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. ⁵ Enter any order with respect to suspension and probation. ⁶ For use of Court wishing to recommend a particular institution.

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____
Defendant noted appeal on _____
Defendant released on _____
Defendant elected, on _____ not to commence service of the sentence.
Defendant's appeal determined on _____
Defendant delivered on _____ to _____

at _____, the institution designated by the
Attorney General, with a certified copy of the within Judgment and Commitment.

United States Marshal.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
March 21, 1955
HARRY M. HULL, CLERK

UNITED STATES OF AMERICA

vs.

Re: Criminal No. 544-55

GRAFT T. MARTIN
Box 25, Lorton, Virginia

NOTICE TO VICTIMS JUDICIAL, SET ASIDE SENTENCE
U. S. DISTRICT COURT, DISTRICT OF COLUMBIA

Jurisdiction of this Court is invoked pursuant to the provisions of 28, U. S. Code, 1255, which reads in pertinent as follows:

"A prisoner in custody under sentence of a Court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the Court which imposed the sentence to vacate, set aside, or correct the sentence.

"A motion for such relief may be made at any time".

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the Court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto."

And as grounds of his motion, the defendant submits to the Court as follows:

1. The defendant was arrested on the 29th day of March, 1955, at about 1:30 a.m. for the alleged sale of an illegal drug; to an alleged "special employee" of the Metropolitan Police Department. This "special employee" was not a witness at the trial, and therefore the defendant was denied the right

to be faced with his accuser as guaranteed by the Fifth Amendment of the Federal Constitution. There was no eye witness to the alleged crime; this (pimp, informer) which the Police Department states is a "special employee" and on whose statement to said Police Department caused the arrest, is the accuser in this action, and therefore he should have been in Court so that the defendant could have questioned him as to the nature of the crime charged, since he appeared before the Grand Jury and it was his testimony that caused the Grand Jury to return an indictment against the defendant.

2. That the defendant's home was broken into, his house was searched without a warrant, the evidence seized without a warrant was illegal inasmuch as the search as no person of the Police Department witnessed the alleged crime and the Government has never produced the (pimp, informer) known as the "special employee" of the Police Department to prove that the act was committed, as stated by the police Officers who testified. It is a well stated fact that all drug addicts make false statements. See: Felton vs. United States, D. C. App. 18 D. C. Also: Kelly vs. United States, 90 U. S. App. D. C. See: Cortez vs. United States, 215 F.2d 22, 227, (D. C. Cir. 1954):

"An uncorroborated tip by an informer whose identity and reliability are both unknown does not constitute probable cause to make an arrest".

The defendant contends that his arrest was illegal due to the fact that it was made without a search warrant and in violation of his Constitutional Rights secured to him as the accused by the Constitution of the United States and the Laws governing the same.

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

The general principles of law governing searches and seizures are aptly summarized in the following excerpt from United States vs. Jeffers, 342, U. S. 48 (1951) Aff. 88 U. S. App. D. C. 58, 187 F.2d 598 (1950):

"The Fourth Amendment prohibits both unreasonable searches and seizures and its protection extends to both 'houses and effects'. Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial process. See: Weeks vs. United States, 232 U. S. 383, (1944); Agnew vs. United States, 239, U. S. 20, (1935)".

"Only where incident to a valid arrest, United States vs. Rabinowitz, 339 U. S. 56 (1950), or in exceptional circumstances, Johnson vs. United States, 333 U. S. 10 (1948) may an exemption lie, and then the burden is on those seeking the exemption to show the need for it. McDonald vs. United States, 335 U. S. 451 (1948)".

"In the absence of a search warrant and a valid arrest, the only conceivable way to defend the instant search as 'probable cause' is to find (a) a probable cause and (2) a 'grave emergency' which made it impossible for the police to present that probable cause to a United States commissioner for the issuance of a warrant. See: McDonald vs. United States, 335 U. S. 451, 455, (1948); Johnson vs. United States, 333 U. S. 10, (1948); Smith vs. District of Columbia, 35 U. S. App. 242, 178 F.2d 13 (1949), Aff 339 U. S. 1, (1950)".

There was, in the instant case, an absence of the reasonable or probable cause prerequisite to an arrest without warrant. See: United Cigar Store Company vs. Young, 36 U. S. App. D. C., 390.

3. That the defendant contends that his Constitutional Rights were violated when he was not faced with his accuser as required by the Fifth Amendment of the Constitution of the United States, due to the fact that he was never identified by any complainant nor did his complainant appear against him whereby they could be examined as to the nature of the offense, but in the alternative members of the Metropolitan Police Department testified that during the trial and such testimony given

R. P. 14

by those Metropolitan Police Officers, was hearsay. There was no "eye-witness" nor a complainant stating that the defendant had committed the crime in which he was charged. Therefore, the testimony adduced during the trial was uncorroborated and such testimony should have been stricken from the record and not permitted in evidence before the jury. The defendant contends that this was a violation of his Constitutional Rights and denied him a fair and impartial trial as guaranteed under the Sixth Amendment of the Federal Constitution.

4. That the defendant was sentenced to imprisonment for a period of from Twenty-eight (28) to Eighty-four (84) months, which sentence is illegal, and not authorized by statute, as will be shown herein. The Court was without jurisdiction to impose such sentence; the sentence is in excess of that authorized by law, and is therefore subject to collateral attack.

The pertinent parts of the statutes involved, are as follows:

Title 26, Section 2557 (b), United States Code:

Whoever commits an offense or conspires to commit an offense described in this sub-chapter, sub-chapter C of this chapter, or parts V and VI of sub-chapter A of Chapter 27, for which no specific penalty is otherwise provided, shall be fined not more than \$2,000.00 and imprisoned not less than ten or more than twenty years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted!!

Public Law No. 561 76th Congress, 3rd Session,

H. R. 9210, Section Three (3) amended under date of July 15

1932, reads as follows:

"Sec. 3 That hereafter, in imposing sentence on a person convicted in the District of Columbia of a felony, the Justice or Judge of the Court imposing such sentence shall sentence the person for a maximum period not exceeding the maximum as fixed by law and for a minimum period not exceeding one-third of the maximum sentence imposed, and any person so convicted and sentenced may be released on parole as herein provided at any time after having served the minimum sentence. Where the maximum sentence imposed is life imprisonment, a minimum sen-

tence shall be imposed which shall not exceed fifteen years' imprisonment. Nothing in this Act shall abrogate the power of the Justice or Judge to sentence a convicted prisoner to the death penalty as now or hereafter may be provided by law'.

(b) For any felony committed before this Amending Act takes effect, the penalty, sentence, or forfeiture provided by law for such felony at the time such felony was committed, shall remain in full force and effect and shall be imposed, notwithstanding this Act".

5. That the defendant makes collateral attack upon the ground that the sentence was imposed contrary, and in violation of the Statutes of the District of Columbia Code as have been cited herein, and Title 28, Section 2557 (b), United States Code. Moreover, the trial Court did not have jurisdiction to impose said sentence in the United States District Court for the District of Columbia.

6. That the United States Code, Title 26, Section 2557 (b) provides that a person convicted under this Statute cannot be imprisoned for less than two (2) years or more than five (5) years for the first offense; for a second offense, not less than five (5) years or more than ten (10) years. For a third or subsequent offense, the punishment shall be a fine of not more than \$2,000 and imprisonment for not less than ten (10) and not more than twenty (20) years. Therefore, the United States District Court for the District of Columbia cannot impose a sentence of a minimum, less than that authorized under section 2557 (b) of Title 26, United States Code, due to the fact that Public Law No. 561, 76th Congress, 3rd Session, H. R. 9210, provides that the Judge in imposing a sentence upon a person convicted in the District of Columbia of a felony, shall sentence the person for a maximum period not exceeding the maximum fixed by law, and to a minimum period not exceeding one-third of the maximum sentence imposed.

7. That Title 26, Section 2557 (b), United States Code was enacted by Congress and in that Act they have provided for a minimum sentence that must be imposed. If a substitute is imposed by a Judge, less than that authorized by law under Section 2557 (b), cited as the Boggs Act, it is contrary to the Statute and the man is illegally sentenced. This applies only to those convicted under the United States Code, in the United States District Court for the District of Columbia. The Judge cannot create a different minimum from that authorized by Congress in imposing sentence upon a person convicted under Title 26, Section 2557 (b), United States Code.

R. P. 16

8. Defendant contends that there has been such a denial and/or infringement of his Constitution Rights as to render the judgement subject to collateral attack, as to move the Court to cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto; that the Court vacate and set aside the sentence, and discharge the defendant or resentence him or grant a new trial or correct the sentence as may appear appropriate.

9. That the motion and the files and records of the case cannot conclusively show that the defendant is entitled to no relief, but on the contrary, the motion and the files and records of the case conclusively do show that the defendant is entitled to relief pursuant to the provisions of 28 United States Code 2255; that defendant has prepared this motion without professional knowledge of the law and without the aid of competent and experienced counsel, as best he can.

WHEREFORE, the premises of this motion considered, defendant moves the Court:

1. To vacate the judgement; to set aside the sentence imposed upon him, and to discharge him from custody or in the alternative.

2. To cause notice of this motion to be served upon the United States Attorney, to grant a prompt hearing on this motion; to determine the issues and make findings of fact and conclusions of law with respect thereto.

Respectfully submitted,

/s/ Grant Martin
Grant Martin, Defendant

CERTIFICATE OF SERVICE

R. P. 17

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed:
March 23, 1956
HARRY M. HULL, CLERK

UNITED STATES OF AMERICA

vs.

GRANT T. MARTIN

Criminal No. 544-55

ORDER DENYING DEFENDANT'S MOTION TO VACATE
JUDGMENT, SET ASIDE SENTENCE, DISCHARGE DEFENDANT FROM CUSTODY,
OR IN THE ALTERNATIVE, GRANT A NEW TRIAL, AND THE RECORD HEREIN,

Upon consideration of defendant's motion to vacate judgment, set aside sentence, discharge defendant from custody, or in the alternative, grant a new trial, and the record herein, and it appearing to the Court that there is no substantial issue of fact which requires a hearing, and the Court finding that defendant's motion is without merit, now, therefore, it is, by the Court, this 23rd day of March, 1956.

ORDERED, that said motion be and the same is hereby denied.

JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed:
October 26, 1956
HARRY M. HULL, CLERK

GRANT T. MARTIN, PETITIONER
Box 25, Lorton, Virginia

vs.

Criminal No. 544-55

UNITED STATES OF AMERICA

PETITION TO VACATE SENTENCE AND SET ASIDE
CITIZENSHIP OF THE UNITED STATES, 1925
FEDERAL RULES OF CRIMINAL PROCEDURE AND BE
SENTENCED AS PROVIDED BY LAW

Comes now the Petitioner, Grant T. Martin in proper person, Pursuant to Title 28, Section 2255, USCA, and moves this Honorable Court to vacate sentence imposed in criminal case No. 544-55 United States of America v. Grant Martin, and as cause therefore, show the Court as follows:

That the Petitioner is a citizen of the United States, and is over twenty-one (21) years of age and at present is confined in the D. C. Reformatory Lorton, Virginia.

That the jurisdiction of this Honorable Court to issue such Process of Law is invoked under the due process of Law-under criminal Procedure anti-date is called to the following citations; Walker v. Johnson, 312 U. S. 275, 61 Ct. 85 Bl. 83, Carter v. Woodring, 67 App. D. C. 393; Johnson v. Zerbst, 304 U. S. 458; United States McDonald et al, Fed 754; Frank v. Mangus 35 S. Ct. 582, 590 L. Ed. 969.

R. P. 20

The Petitioner was sentenced to a term of Twenty months to sixty months and a fine of One Hundred Dollars (\$100.00) on each of counts one, two and three said sentences by the counts to run concurrently; eight months to twenty-four months and pay a fine of one Hundred Dollars on count five; said sentence to take effect at the expiration of the sentence imposed in count one, two, and three, and payment of the fines be and is hereby suspended.

The Petitioner was sentenced to a total of twenty eight (28) months to eighty four (84) months by Honorable Judge Richmond B. Keech. for violation of Secs. 4704 (a), 4705 (a), Title 26 U. S. Code and violation of Sec. 174 Title 21 U. S. Code in Counts 1, 2, 3, and 5 on the 23rd of December, 1955.

It is adjudged that defendant has been convicted upon his plea of not guilty and a verdict of guilty.

QUESTIONS PRESENTED

1. Is the Petitioner illegal sentenced under Title 21 Section 174 Amended November 2, 1951?
2. Was the indictment erroneous?
3. Was the Petitioner placed in double jeopardy?
4. Was the arrest of the petitioner illegal and violated the Fourth Amendment?
5. Was the evidence obtained without an arrest warrant or Search warrant was a violation of the Fourth Amendment?
6. Was it a violation of the 6th Amendment for the petitioner not be confronted with the Government witness?

7. Was the petitioner properly represented by counsel when he refused to make a motion to suppress the evidence, when the petitioner asked him before trial and during the trial.

R. P. 21

FACT

The police stated under oath during the trial that the special enformer came to headquarters and told him he could get some narcotics from the petitioner; this witness was never produced at the trial; this witness was never at the Commissioner of the United States office when the petitioner was before the United States Commissioner for a hearing.

During the trial, I told my Attorney that the man that came to my house, and when I opened the door to let him out and the Police rushed in without a search warrant or an arrest warrant was named Clifton Reader; that he was working at the Fish Market down by the Wharf, and this was brought out in Court.

There was no attempt by the Court or the U. S. Attorney to get this witness in Court. When the Police rushed in my home without a search warrant or an arrest warrant, and searched the petitioner and found marked money, then searched the petitioners home and found narcotics. They found other things that were not brought out in Court or was returned to the petitioner.

ARGUMENT OF FACT AND POINT OF LAW

Is the petitioner's illegal sentence under Title 21 Section 174 amended November 2, 1951.

R. P. 22

The Petitioner maintained that the Count was erroneous; that count 4 and 5 was illegal because same as in count one (1) of the indictment namely Title 21 Section 174; The Petitioner was found not Guilty of Count four (4).

Count five (5) was the same as count two (2) of the indictment and they are duplicity namely Section 4705 (a) Title 26. The Petitioner was sentenced to twenty months to Sixty months in Count 2, running concurrently with Count 1, 2, and 3.

The Petitioner was sentenced on Count five (5) to Eight months to twenty four months on Count five (5); Count five is the same as count two (2) of the indictment namely Title 26 Section 4705 (a).

The Petitioner maintained from the above mentioned remark, the Petitioner was placed in double jeopardy.

"In determining whether separate counts of indictment constitute the same offense, the test to be applied is whether such provision requires proof of additional fact or evidence Herrnstein v. United States, 201 F. 2d, 463; B. C. v. United States, 75 U. S. App. D. C. 301 See also Albrecht v. United States 273 U. S. 1.

Defendant Petitioner asserts and alleges that reserves the right to litigate the issue on the question of consecutive construction of the sentences under the decision of Conperthwaite v. United States 37 F. ed. (2d) 846 Therein the Court said:

"The same Act may not be punished by the Sovereignty merely because it violates two laws. Indemnity, or double jeopardy, is shown if the same evidence necessary to prove either offense will also necessarily establish the other and the (R. P. 22)-- relation is reciprocal (and Perhaps even if not reciprocal); in other words can either be shown without disclosing the other. United States v. Miller, 6, 230 Fed. 1, 2 Miller v. United States

TWO SEPARATE OFFENSES

"The Government rule has been reiterated recently by the Supreme Court in Perkins v. United States 1954 347 U. S. 1, 9, 74 Section 358 353; Defendant may be convicted of two separate offenses even though the series of acts so long as each requires the proof of a fact not essential to the other.

Well v. United States, No. 14854 United States Court of Appeals Fifth Circuit Feb. 9, 1954, "The Appellant in four counts charging the robbery of a bank by force and violence, assault upon a person in jeopardy by the use of dangerous weapons and entering the bank with the intention of committing a felony therein Well was sentenced to the maximum imprisonment of each count, to be served consecutively, the first motion resulted in the setting aside of the sentence counts one and two for the reason that the first three counts Alleged Only One Offense.

Sentence imposed on separate Counts where an indictment was made up of numerous counts, but which were all split of one continuous offense are void, as but one sentence can result where offense was committed, See "Ex-Parte Long Mass No. (130 F. Supp. 94, 88 Fd. 2nd. 86, 96 C. A. 1937; Ex-Parte Carpenter Case No 13389 C Iaregan)

Opinion by Gilbert J. Fed Chrysler v. Zerbst: Horton v. Zerbst 83, Fd. (2d. 677); Casebeer v. United States Fd. 2nd. 638.

The test be applied in such cases is as has the accused been twice put in jeopardy for the same offense (2) Cavers vs. United States 220 U. S. 388.

The petitioner is a first offender for Narcotic Drug, Congress has passed a law that a first offender, the penalty is five years maximum.

The Petitioner was sentenced to a maximum term of Seven (7) years. Therefore the Petitioner is illegal Sentenced.

Public Law 591, 83rd Congress
Internal Revenue Code of 1934
Sec. 7237 Violation of Laws Relating
to Narcotic Drugs and Marihuana

"Provide in Paragraph Part:

(a) Violation of Law Relating to opium and coca leaves and marihuana whoever commit an offense described in subpart C of Part I, or Part II of Subchapter A of Chapter 39 for which no specific Penalty is otherwise provided, shall be fined not more than \$2,000 and imprisoned not less than 2 or more than five (5) years for a second offense, the offender, the offender shall be fined not more than \$2,000 and imprisoned not less than 5 or more than 10 years.

It was held in U. S. v. Winham, (1920), 264 Fed 377, that the General rule for the Construction of a penal Statute is that when a later Statute is enacted inconsistent with a Preceding Statute and covering the entire ground of the subject matter it supercedes and (R. P. 26) of sustaining any proper action or prosecution for the enforcement of any such penalty, forfeiture, or liability, The expiration of a temporary statute shall not have effect to release or extinguish any penalty, for future, or liability incurred under such statute, unless the temporary statute shall so expressly provide, Unless the temporary statute shall so provide. Any such statute shall still be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture of liability."

Because this General saving clause is not in conflict with 25 Stat. 767 (now known as section 174 Title 21, U. S. C.) both are applicable, Pertz v. Wood, 218 U. S. 205

In an effort to cure this anomaly Congress enacted the General Savings Statute quoted above as well as saving clauses in individual saving clauses in individual penal legislation. The Volstead Act for example, provides inter-alia.

"Nor shall this Act relieve any person from

R. P. 26

Liability Civil or criminal, therefore or thereafter incurred under existing laws."

The Government relied on this provision in Yoginovich v. U. S. 256, U. S. 450, but the Court held that Congress did not intend to preserve the old penalties prescribed in addition to the specific provision for punishment made in the succeeding Volstead Act. Petitioner's situation is identical. The Amendment effective in Section 174 on November 2, 1951 is identical in all respects with the exception of Punishment. If Congress intend to (R. P. 27) preserve the old penalty, or they could have stated: for each offense or for each and every violation or that each Act will be a separate this was not one and the Court is restrained from reading it into the statute the saving Statute does not ask the Court to do so.

"In Public Law 728 84 Congress Provides:

"(1) the offense consisted of the sale barter, exchange, giving away, or transfer of any narcotic drug or marijuana to a person who had not attained the age of 18 at the time of such offense of "(2) the offense consisted of a conspiracy to commit an offense described in Paragraph (1) The offender shall be imprisoned not less than 10 or more than 40 years, and addition, maybe fined not more than \$2,000. See Sec 7237 "a' and 'b'

Approved July 18, 1956.

In the above mention section leave no doubt what a offense consist of.

The law the Petitioner sentence under congress did not make it plain what a offense consist of.

The Supreme Court of the United States
No. 500 October Term 1953 United States of
v. Elويد Dixon the Supreme Court stated:

"Clearly Congress may imposed both a criminal and a civil sanction in respect to the same act; this is neither unusual nor constitutionally

R. P. 27

objectionable See "Helvering vs. Mitchell 303 U. S. 391, 399, 400 (1938) Likewise it is common in drafting legislation to declare certain Acts unlawful in one section and set forth penalties for their in another e. g. Fair Labor Standard Act 22 U. S. Section 215, 216 Internal Revenue Narcotics) Sections 2553, 2554, 2557

R. P. 28

The Supreme Court also stated in the Dixon case: The only suggestion on the fact of the statute that sec. 3116 was meant to be Remedial and no other more came from its caption "Forfeiture and seizure supplied by the codifiers in 1939, but in enacting the code Congress provided that." The arrangement and classification of the several provisions of the Internal Revenue title have been made for the purpose of a more convenient and orderly arrangement of the same and therefore, no inference, implication or Presumption of legislative construction be drawn or made by reason of the location of Grouping of Particular section Provision or Portion thereof nor shall any outline analysis cross reference, or descriptive matter relating to the contents of said Title be legal effect 53 Stat. 1 A.

"To Accomplish its primary purpose of bringing together all operative revenue law and making them more comprehensible. The Code made" Liberal use of catch words"

"H, Rep No. 676th Cong. 1, 81 sec 3; Rel. No 20 76th Cong 1 st Sess. 3.

The court bare in mind what have been said in the Dixon case and Helvering vs. Mitchell case of this motion at Page 9. and Sec 7237 violation of Laws Relating to narcotic drug and to marihuana (a) and (b) Act as amended (21 U. S. C. 174. It leave no doubt that Congress Will; intent was five years for a first offense.

"The Supreme Court stated in a late decision:

"Robert Cielib vs. United States No 468 October Term 1954 decided May 9, 1955-
"one more it became necessary to determine what Congress has made allowable

R. P. 29

Unit of prosecution see also United States vs. Universal C. I. I. Credit Cor. 344 U. S. 218, 221 under a statute which does not explicitly give the answer: Robinson vs. United States 143, 24 267.

"Constitute a "Second offender" it must have been committed after conviction for a first offense (National Prohibition Act Title 2 Sec. 29 (27 U.S.C. 46) Holt vs. Marshal the Court of Appeal Fifth Circuit January 30, 1928 "A second offense is one committed after conviction for a first offense and a third or subsequent offense one committed after two former convictions.

The Court also stated: in the Holt vs. Cotts "The offenses charged in the first and second indictment were committed about the same time, and before the finding of any indictment

For offense see, Finner vs. United States (c.c.A.) 278 F. 415; Edwards vs. Thicke (c.c.A.) 11 F 2d 235; Commonwealth vs. McDermott 224 Pa 363, 73 A 427, 24 L. R. A. N.S.) 431

The Supreme Court stated in United States v. Cialb 342, 956 decided May 9, 1955:

"That Congress have it will no difficulty in expressing if--when it desire to make each stick in a single original unit when Congress leaves to the judiciary, the task of imputing to Congress an undeclared will the Ambiguity should be resolved in favor lenity and not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in prescribing evil or antisocial conduct. It may fairly be said to be presupposition of our law to resolve doubt in the enforcement of a Penal Code against the imposition of a harsh Punishment.

The Boggs Act say a first offense the sentence is two (2) to five (5) years. Therefore the petitioner was illegal sentence; The indictment was double jeopardy. One arrest five counts the indictment is double jeopardy at the most it could been three (3) count; The petitioner found guilty on four (4) count.

R. P. 30

was the indictment erroneous

Was the Petitioner place in double jeopardy

The Petitioner maintain there are but three (3) count to a sale--March 2, 1956 the U. S. Attorney visit the Institution for the Purpose of explaining the Boggs Act Mr. Smithson's stated: Count 1, and 2 are a direct violation of Title 26, Section 2553 (a), and 2554 (a) of the Internal Revenue Code. This is the Harrison Act Governing the illegal drug not being in the original stamped package, which is a direct violation of that Section of the Tax Act.

Count three is the violation of Title 21, Section 174 of the U.S. Code.- This Section is more familiarly know as the Jones-Miller Act which forbids the facilitation and concealment of the forbidden drug.

The Petitioner that he three (3) Count amendment by Title 21, Section 174, that the three (3) violation for a first offender the sentence is two (2) to five (5) years.

The Petitioner was indicted on five count and found guilty on four (4) of one transaction, alleged by the Government at the same time.

In United States v. Blackburner 254 U. S. 299. The Court said the same in that case was distant.

The U. S. Attorney could not say that the Petitioner case is in line with the Blackbarger decision and the Petitioner maintain that they are distinguishable and does not create two transaction.

"Kendrick v. United States for the district of Columbia decided October 19, 1956 opinion by Judge Wilber K. Miller the Court said:

"A single act which violates two statutes in Punishable under both unless the offenses defined therein are identical."

R. P. 31

The Petition have Pointed out that he was found guilty on four counts" and there but three (3) count to the violation narcotic act therefor the Petitioner is place in double jeopardy.

In United States Court of Appeal for the District of Columbia in John B. Monroe v. United States No. 12683 decided April 30, 1956, the Court stated:

"Monroe was sentenced under the conspiracy court to imprisonment for twenty months to five years and to pay a fine of \$1,000. He was also sentenced for sixteen months to four years for each bribery conviction, these sentences to run concurrently with one another and with his conspiracy sentence. Since the latter is for a longer time than his concurrent sentences for bribery, and since the conspiracy and bribery charges are intimately related, the judgment should be affirmed if no reversible error impairs the conspiracy conviction. The Petitioner maintain that two of the count are identical and they run consecutively and not concurrently as the court pointed out in the Monroe decision the Petitioner urged upon the Court.

1. The indictment was erroneous. (2) The Petitioner was place in double jeopardy, and the remedy is by Section 2255 Title 28.

2 Hirabayashi v. United States, 320 U.S. 85; United States vs. Trenton Potteries, 273 U. S. 392, 402; Pierce v. United States, 252 U. S. 239, 252-3; cf Brumbett v. United States, U. S. App. D. C.--F. 2d - Cert. denied, U. S. --, compare Nelms v. United States, 94 U. S. App. D. C. 267, 215 F.2d 678; Washington v. United States U. S. App. D. C., F 2d.

was the arrest of the Petitioner and violate
the Fourth Amendment of the United States

"The Fourth Amendment Prohibits both unreasonable searches and unreasonable seizures, and its protection extends to both houses and effects over and again this Court has emphasized that the mandate of the Amendment requires adherence to Judicial Processes See Week v. United States, 232 U. S. 383 (1914); Atello v. United States, 269 U. S. 20 (1925), only where incident to a valid arrest United States v. Robinson, 339 U. S. 56 (1950), or in exceptional circumstances Johnson v. United States 333 U. S. 10 (1948), may an exemption lie, and then the burden is on those seeking the exemption to show the need for it McDonald v. United States 335 U. S. 451, 456 (1950)." 342 U. S. At 51.

The Police stated under oath during the trial that the special informer came to headquarters and told him he could get some narcotic from the Petitioner; this witness was never produced at the trial; This witness was never produced at the trial or at the hearing of the United States Commissioner.

When the Police Rush in my home when I let the special informer out of my home without a search warrant or a Rest warrant, and search the Petitioner and found mark money, Then search the Petitioner home and found narcotic. They also found other thing that was not brought out in Court or was return to the Petitioner.

The U. S. Supreme Court reversed the conviction in the Week case stated:

"That search of the home without proper warrant unreasonable" The Court then stated that no (R. P. 33) evidence against anyone who privacy has been unreasonably invaded to get that evidence may be used, no matter how clearly it established Guilt. Guilt or innocent should not enter the findings but obstructed Police efficiency."

This Court stated in United States v. Marion D. Whitley decided October 12, 1956 that arrest without probable cause and without a warrant is illegal.

"The gist of the Whitley case was:

"Marion D. Whitley was arrested after a Police Informer bought 25 capsules of heroin with marked money in the rooming house where she lived.

The Police said the informer had given them about "A particular room and also about a Particular person." The Whitley woman and another woman Doris Meredith occupied a third floor bedroom.

Without a warrant the Police entered the house and went to the third floor. Through an open door

they saw the vitely woman in a bathroom. They entered and arrested her. The bathroom was not connected with the bedroom. Some of the Police went through a window from the bathroom to a porch. From there, they looked into the bedroom and saw Doris Meredith preparing to take a hypodermic injection. They entered the bedroom. Searched it and found narcotics.

Found Marked Money

Then they asked the Whitely woman where her money was and she indicated it was in her purse. They took the marked money from the handbag.

The Court pointed out that the seized narcotics had been suppressed as evidence. But the Court said

"We thing the Murev as well as the narcotics should have been suppressed."

The Court said it found no evidence that the Whitely woman had consented voluntarily to the search and seizure. The Court cited the fact the woman was under arrest at the time and said this indicated duress.

(R. P. 34) "Since the room in which (the woman) was arrested was separated by a corridor and a locked room from the room that was search and seizure where incidental to her arrest. Even if they were incidental, the arrest did not justify the search and seizure, for there was no proof that the arrest was legal.

The Petitioner case is direct in line with the above-cited late decision by this Appael Court

"The Petitioner was never at any time face with the seuseer. "This Special Police informer at the hearing of the Petitioner case before the U. S. Commisioner or doing the Petitioner trial., which as a violation of the 6th Amendment of the United States.

The Police did not have a search warrant or a arrest warrant or show probely cause to arrest the Petitioner, or show probely cause doing the trial and the arrest violate the Forth Amendment. See the openion of United States v. Warren Williams decited October 12, 1955.

The Petitioner maintain that his arrest violated the Fourth Amendment and tainted the events which followed.

"Appellant urged upon this Court the overwhelming authority for the proposition that the Fourt Amendment guarantees the right of the individual to be secure in his person against unreasonable arrest, as well as against unreasonable searches. The most recent pronouncement to this effect was made by this Court in Wrightson v. United States 95 App. D. C. 390 393, 222 F. 2d 558 (D. C. Cir. 1955)

"The evidence obtained without a search of the victim's premises or person but as result of other Police conduct violate of the Forth Amendment must be excluded

R. P. 35

The Appellant places Great reliance on the opinions of this Appeal Court and the Supreme Court in United States v. Jeffers, 342 U. S. 48 (1951) Affirming 88 App. D. C. 58, 187 F. 2d 498 (D. C. Cir. 1959) Jeffers in the leading authority for the proposition that evidence not obtained by means of an unlawful search of defendant's Premises or person must never the less be excluded if obtained "otherwise in violation of the Forth Amendment." 88 App. D. C. At 61-62, 187 F.2d At 501-02.

Even the fact that the unconstitutional conduct which enabled the Police to seize the incrimination evidence in Jeffers was only unconstitutional as against a person other than the defendant did not prevent this Court and the Supreme Court from invoking the deferrent remedy of exclusion:

Statutes and Rules involved
As To The Arrest And Seizure
U. S. Const. Amend IV

the right of the People to be secure in their persons, houses, papers and effects against unreasonable searches and seizures # 3 shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation. And particularly describe the place to be searched, and the persons or things to be seized.

Federal Rules of Criminal Procedure, Rule 41 (e):

"Motion for Return of Property and to suppress evidence. A person aggrieved by an unlawful search and seizure may move the district Court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant.

xxxThe Judge shall receive evidences on any issue of fact necessary to the decision of the motion. If the Motion is granted the Property shall

be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The Motion to suppress evidence may also be made in the district where the trial is to be had. The Motion shall be made before trial or hearing unless opportunity therefor did exist or the defendant was not aware of the grounds for the Motion, but the Court in its discretion may entertain the motion at the trial or hearing,"

"In Contee v. United States, 14 App. D. C. 297, 215 F. 2d 324 (D. C. Cir. 1954) this Court strack down sum sponte an arrest based on a similar slowly source.

Although the Question of failure to suppress certain evidence obtained by the Police as a result of the tip/had not been raised by counsel. the misconduct of the Police in acting on this anonymous source was deemed so serious that this court exercised its Power to notice "Plain errors or defect affecting substantial rights" on its own motion and reversed the conviction.

R. P. 36

Respectfully Submitted

/s/ Grant T. Martin

R. P. 38

ORDER DENYING MOTION TO VACATE SENTENCE AND
TO SET ASIDE CONVICTION UNDER 28 U. S. C. 2255

Upon consideration of the defendant's motion to vacate sentence and to set aside conviction, filed under 28 U. S. C. 2255, and the record herein, and it appearing to the Court that there is no substantial issue of fact and that the sentences imposed on each count were lawful, it is, by the Court, this 7th day of November, 1956,

~~ORDERED~~ That said motion to vacate sentence and set aside conviction be and it hereby is denied.

/s/

JUDGE

R. P. 39

NOTICE OF APPEAL

I Grant Martin in the above entitled action depose and say,

That the Appeal from the denial of his motion under Title 28, Section 2255 to vacate sentence and set aside conviction on the 7th day of November 1956

I, the above named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above Stated Judgment.

Grant Martin
Grant Martin

Notary Public

R. P. 44

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES

v.

Criminal No. 544-55

GRANT T. MARTIN

Washington, D. C.

Thursday December 1, 1955.

The above-entitled cause came on for trial before
Honorable Richmond B. Keach, United States District Judge,
and a jury, at 12:00 o'clock, noon.

APPEARANCES:

On behalf of the United States:

Arthur J. McLaughlin

On behalf of the defendant:

William Tinney.

. . .

R. P. 50

DIRECT EXAMINATION

BY MR. MC LAUGHLIN:

Q Your full name is what?

A Guy W. Holcomb, Jr.

Q You are a member of the Metropolitan Police Department?

A Yes, sir.

Q And assigned to any particular detail?

A To the Narcotic Squad.

Q Were you so assigned to the Narcotic Squad of the Metropolitan Police Department.

A Yes, sir.

Q And were you so assigned on March 29th of 1955?

A Yes, sir.

Q Recalling your attention to that date of March 29 of 1955, did you see a person identified to you as Clifton Reeder?

A Yes, sir.

Q And when and where did you see Clifton Reeder on March the 29th of 1955?

A I first saw Clifton Reeder, it was about 11:30, 11:00 o'clock or 11:30 that night in the Southwest section of the city. We took, myself and other officers, took Clifton Reeder to the office--

R. P. 51

Q To what office?

A The office of the Narcotic Squad.

. . .

Q As a result of questioning him, what did you do?

A We had Reeder make a telephone call. As a result of the telephone call we marked up \$100 in United States currency, and then I searched Reeder and gave him the \$100 and we took him to the vicinity of --

Q At the time that you searched Reeder you searched Reeder for what?

A For money or narcotics.

Q Did you find any monies or narcotics on him?

A No, sir.

Q Did you find any order form issued by the Secretary of the Treasury for the purpose of narcotics?

A No, sir.

R. P. 52

Q Now, did there come a time when -- when you say you marked money, what do you mean by that?

A We recorded the serial numbers of a hundred dollars.

Q After you recorded the serial numbers of the \$100, what did you do with the \$100?

A Gave it to Reeder.

Q And after you gave the \$100 to Reeder, then what did you do or where did you go?

A We went to the vicinity of the 1500 block of First Street, Southwest, where we let Reeder out of the car.

. . .

A We let reeder out of the car and we followed him to 1503 First Street, Southwest, where we observed him enter and we further observed him enter apartment 2.

. . .

R. P. 53

Q Now, prior to Reeder going in those premises, did you have any arrangement with him?

A Yes, sir.

Q And what was that?

A If he had purchased any narcotic drugs when he came out he was to hold the door open and talk to whoever he had purchased narcotic drugs from.

Q And after you saw Reeder enter those premises, did there come a time when you saw him again after that?

A Yes, sir.

Q And when was that?

A About five minutes after he had entered.

Q Now, where did you see Reeder five minutes after he had entered those premises?

A Standing at the door of apartment 2 at 1503 First Street.

Q Was anyone else with him at that time?

A Yes, sir.

Q Who was with him?

Q The defendant.

R. P. 54

Q Now, when you observed Reeder and Martin standing at the doorway there, what happened next?

A I got a package from Reeder --

Q When you saw Reeder in the door, did Reeder do anything or say anything?

A Yes, sir, he held the door open and was talking to the defendant. I was behind the door, and when I got the package from Reeder, I went around the door and placed the defendant under arrest.

Q At the time that Reeder handed you the package was the defendant still in the doorway?

A Yes, sir.

Q And then you say you placed the defendant under arrest?

A Yes, sir.

Q Now, had Reeder handed you anything in the meantime? Had Reeder given you anything?

R. P. 55

A Yes, sir, he had given me a package.

Q What did the package contain?

A The package contained 100 capsules containing white powder.

MR. MC LAUGHLIN: Mark this as Government's Exhibit for Identification No. 1, please.

(Package was marked for identification as Government's Exhibit No. 1.)

BY MR. MC LAUGHLIN:

Q I show you Government's Exhibit marked for identification No. 1, and ask you if you can identify that?

A Yes, sir.

Q Can you identify Government's Exhibit marked for identification No. 1 as what?

A The package that Reeder turned over to me.

Q By whom?

A By Reeder.

Q Who turned it over to you?

A Reeder.

Q And when and where did he turn it over to you?

A While he was standing at the door of the defendant's apartment.

Q And at the time that he turned it over to you it contained what?

A It contained 100 capsules containing white powder.

R. P. 56

Q Was there any government stamps of any kind on it at the time?

A No, sir.

Q Now, I believe you said after you received Government's exhibit 1 from Mr. Reader, that you then stepped around and placed the defendant under arrest. Is that right?

A Yes, sir.

Q I show you Government's Exhibit marked for identification No. 2.

(Money was marked for identification as Government's Exhibit No. 2.)

BY MR. MC LAUGHLIN:

Q Showing you Government's Exhibit marked for identification No. 2, I ask you if you can identify that?

A Yes, sir.

Q You identify Government's Exhibit marked for identification No. 2 as what?

A The money that we recorded the serial numbers of and which I gave to Reader.

Q And after you had given that money to Reader, recording the serial numbers, did you see that money again that same morning?

. . .

R. P. 57

A After we arrested the defendant and took him up into his bedroom, I took the money from his hand.

Q You took what money from his hand?

A This money from his hand.

Q That is --

A \$100 that we had given to Reader.

Q After taking the money from the defendant's hand, did you compare the serial numbers?

A Yes, sir.

Q Would you say it is the same money that you had previously given to Reeder?

A Yes, sir.

. . .

R. P. 58

Q I show you Government's Exhibit marked for identification No. 3.

(Package was marked for identification as Government's Exhibit No. 3.)

R. P. 59

BY MR. MC LAUGHLIN

Q Showing you Government's Exhibit marked for identification No. 3, Officer, I ask you if you can identify that?

A Yes, sir.

Q You identify Government's Exhibit marked for identification No. 3 as what?

A A package that Officer Panetta recovered from the defendant's pocket in his bedroom.

. . .

R. P. 60

CROSS EXAMINATION

BY MR. TIMNEY:

Q How long have you known Clifton Reeder?

A Well, that night I had known -- I hadn't known him -- I didn't know him too long. I knew of him longer than I knew him.

Q Well, prior to this night about which you are testifying had you ever met him or been in his company?

A I had talked to him, yes, sir.

Q And where is Clifton Reeder today?

A I don't know, sir.

Q Do you know whether or not he is in the District of Columbia?

A The information that we have is that he is not in the District of Columbia.

. . .

Q Well, Mr. Reeder is a drug addict, isn't he?

A Yes, sir.

Q You determined that, did n't you?

A Yes, sir.

Q And you had him arrested down in headquarters or in your office as a drug addict or drug user, right?

A We had him in our office for investigation.

. . .

Q And you say you searched him?

A Yes, sir.

Q Who searched him?

A I did.

Q And what did that search consist of?

A Going through everything that he had on. His clothing, his pockets, sex.

Q Did you undress him?

A No, sir.

Q You didn't strip him naked, did you?

A No, sir.

Q Did you search his body cavities?

A I searched his clothing carefully.

Q No, did you search his body cavities, such as his ears?

A I didn't look down in his ears.

Q Did you search between his legs?

A No, sir.

R. P. 62

Q Did you search the area immediately adjacent to his private parts?

A No, sir.

Q Did you feel up in the area immediately adjacent to his private parts to determine whether or not there was anything other than his natural body there?

. . .

Q And what time of night was it when you first met him? You said you saw him in headquarters that night.

A It was about 11:00 or 11:30.

R. P. 63

Q About 11:00 or 11:30?

A Yes, sir.

Q Now, do you know or are you able to tell us where he had come from immediately before he arrived at headquarters?

A Yes, sir.

Q You are. You are able to tell us that?

A Yes, sir.

Q Now, where did he say he came from -- that he had been just before coming to headquarters?

A We brought him to headquarters.

Q Well, where did you get him from?

A His home.

Q Where is his home located?

A It is on 8th Street, Southwest. I don't know the address.

Q And you didn't make any record of the house from which you took him?

A I could go to his house right now if I was going there but I don't know the address.

Q And you say it is in Northwest?

A Yes, sir.

Q Now, when you went to this house in southwest to get him, are you able to tell us how long he had been there at that house before you went and got him?

A No, sir.

. . .

R. P. 65

Q Do you know how many pockets he had in this coat the top coat to which you have referred?

A I don't recall.

Q You are not able to tell us whether he had side pockets or inside pockets?

A He had side pockets. I don't know whether he had inside pockets or not.

. . .

R. P. 72

Q And you don't know of your own personal knowledge, do you, whether or not anyone else was in the apartment other than the defendant and this man whom you have identified as Clifton Tiedler?

A At the time that they were in there?

Q Yes.

A No, sir.

Q Where is the bedroom in this apartment in relation to the place where you were standing?

A The bedroom is in the front.

. . .

R. P. 73

Q And from your vantage point you were not able to see the bedroom at all?

A No, sir.

Q I mean the -- excuse me, not the bedroom, the living room, what you have referred to as the living room?

A No, sir.

Q Where was the living room in relation to the bedroom?

A The living room was -- it came out into a hallway and the living room was on the left as you came out into the hallway. It was in the back of the bedroom.

R. P. 74.

Q And is it your testimony that you recovered something upstairs which you took away with you? I am not speaking now of anything other than contraband now. That is all I am speaking of now.

A Yes, sir.

Q Narcotics, in other words?

A Officer Panetta recovered a package in the defendant's sweater.

Q Now, were you present when that happened?

A Yes, sir.

Q And where was this sweater located?

A It was hanging on the chair beside the bed.

Q It wasn't in the closet or anywhere?

A No, sir.

R. P. 75

Q And it was beside the bed and, of course, you are referring to the bed within the bedroom. Is that right?

A Yes, sir.

Q And it was readily -- withdraw that and put it this way.

It was in open view to you and to Officer Panetta or to anyone else who came into the room?

A The sweater was.

Q I say the sweater.

A Yes, sir.

Q When you say it was hanging on the chair, do you mean on the back of the chair?

A Yes, sir.

Q What type of sweater was it by the way?

A Just a plain ordinary sweater, had pockets, two pockets, a long-sleeved sweater.

. . .

R. P. 79

Q Now, Officer Holcomb, is it a fact that this man is in the District of Columbia and his whereabouts are known to the police department at this time and to you?

A No, sir.

(Counsel spoke to defendant.)

Q Now, isn't it a fact that this man is working today at the Eagle Fish Market, Southwest?

A He may be.

. . .

R. P. 83

REDIRECT EXAMINATION

BY MR. MC LAUGHLIN:

Q Did you bring the defendant up the stairs to the apartment immediately afterward?

A Yes, sir.

Q Reeder handed you the narcotics?

A Reeder handed me the narcotics downstairs.

Q That is what I say and then did you go upstairs?

A Yes, sir.

Q Did you find anyone else in the apartment of the defendant?

A No, sir.

Q Now, I forgot to ask you this question:

When you brought the defendant to police headquarters that night on March 29th of 1955, did you have any conversation with him in regards to the marked monies that was found on him?

A Yes, sir.

Q And what conversation did you have with the defendant as to the marked monies that was found on him?

A I asked him where he got the hundred dollars that we had shown him corresponded with our list, and he said that he had gotten it from Skeeter Reeder.

R. P. 84

I asked him what he gave Skeeter Reeder for the money and he told me that he had given him a hundred capsules for the money. He also stated that the package that Officer Panetta found in his pocket was his and that he had obtained it from a white man named Pete on the corner of 1st and P Streets, Southwest.

Q That is in regards to Government's Exhibit 3, the capsules?

A Yes, sir.

MR. MC LAUGHLIN: I believe that is all I have of this witness, your Honor.

MR. TIMNEY: I have no recross examination, your Honor.

R. P. 85

DIRECT EXAMINATION

BY MR. MC LAUGHLIN:

Q Your name is what?

A John H. Panetta.

Q And you are a member of the Metropolitan Police Department?

A I am, sir.

Q Assigned to what detail?

A Narcotic Squad.

R. P. 88

Q Prior to Reeder going into those premises 1503 First Street, Southwest, had you or had Officer Holcomb in your presence made any arrangement with him?

A Yes, we did.

Q And what was that?

A A pre-arranged signal to let us know that he had secured what he was supposed to.

R. P. 92

CROSS EXAMINATION

BY MR. TIMNEY:

R. P. 110

MR. MC LAUGHLIN: Doctor Young.

THE COURT: Will you gentlemen come to the bench a moment, please?

(At the bench:)

THE COURT: Maybe you have already done it, Mr. Timney. Apparently this defendant knows where this fellow Shooter Reeder or whatever his name is. Have you made any effort to get him or do you want him?

MR. TIMNEY: I haven't because he said he was in the fish market and I checked and I don't even know where the address is. That is my difficulty.

THE COURT: Apparently neither side then knows where he is actually. Is that right?

MR. TIMNEY: That is right. I honestly think so.

THE COURT: All right.

MR. TINNEY: If he is an informer I am not going to bring him in here. I don't think it is fair as a lawyer to expose him.

I will try my case like a gentleman.

R. P. 111

THE COURT: I don't have any doubt that you would do that, but my only thought was if you do want him, don't let's wait so we will be delayed.

MR. TINNEY: Oh, no.

THE COURT: You don't want him?

MR. TINNEY: No, indeed.

(End of bench conference.)

Whereupon

JAMES L. YOUNG

was called as a witness by and on behalf of the Government and, after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MC LAUGHLIN:

Q Your full name is what?

A James L. Young.

Q You are employed where?

A United States Treasury Department.

Q And employed in what capacity?

MR. TINNEY: Excuse me a minute.

May we come to the bench, if your Honor please?

THE COURT: Yes, sir.

MR. TINNEY: We might save a little time.

R. P. 112

(At the bench:)

MR. TINNEY: I think I can very well stipulate on these narcotics without raising formal proof on it.

THE COURT: Have you talked to your man about it?

MR. TIMNEY: Oh, yes, definitely.

THE COURT: He knows?

MR. TIMNEY: Oh, he knows.

THE COURT: There isn't any question of him coming back on it?

MR. TIMNEY: He is not the type of fellow if he is convicted will come back and say that.

THE COURT: You are satisfied that they are?

MR. TIMNEY: Oh, no question about it, your Honor.

THE COURT: All right. We can do it in a very quick way then.

(End of bench conference).

THE COURT: Mr. Timney, I understand you do concede Doctor Young is a qualified chemist and qualified to express an opinion on the matter before him?

MR. TIMNEY: Oh, yes.

THE COURT: You will treat the doctor to be qualified as an expert in this field, ladies and gentlemen.

BY MR. MC LAUGHLIN:

R. P. 113

Q Doctor, I show you Government's Exhibit marked for identification 1-A.

Can you identify that?

A Yes, I can.

R. P. 114

Q Did you make any analysis of Government's Exhibit 1, that is the capsules?

A Yes, I did, sir?

HA

LA B-20-27
6-4-57
①

United States Court of Appeals
For the
District of Columbia Circuit

RECEIVED APR 20 1957

BRIEF FOR APPELLANT

Joseph W. Stewart
CLERK

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

13, 686

GRANT MARTIN, APPELLANT

VS.

UNITED STATES, APPELLEE

United States Court of Appeals
For the
District of Columbia Circuit

FILED APR 23 1957

Joseph W. Stewart
CLERK

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In Re. Grant Martin
Lorton Reformatory
Box 25,
Lorton, Virginia

<u>Bailey v. U.S.</u>	No 13676-9 5/16/57
<u>Morris v. U.S.</u>	216 Fed 187 (10th Cir)
<u>Wheatley v. U.S.</u>	198 Fed 325 + 326 (10th Cir)
<u>Lloyd v. U.S.</u>	3/18/57 No 13330-2

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STATEMENT OF QUESTION PRESENTED

1. Whether defendant was denied effective assistance of counsel as provided by the 6th Amendment of the United States Constitution and the 5th and 14th Amendment of Due Process of Law; that the trial counsel conducted the defendant trial in such a manner that the whole procedure was a mark of justice.
2. Whether the Government witness Clifton Reeder should not been presented at the Petitioner trial that was held in the instant case in the U. S. District Court and also U. S. Narcotic Agent Gannon as provided by the 6th Amendment of the United States to be confronted with you witness.
3. Whether the Petitioner could of been found guilty on count five (5) andnot guilty on count four (4) of the indictment.
4. Was not the petitioner placed in double jeopardy in count five (5) of the indictment.
5. Was not the petitioner illegally arrested.

COMMITMENT PAPER

Grant T. Martin

On the 23rd of December, 1955

Counsel William A. Tinney

It is adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty.

Violation of Secs. 4704 a. 4705a T-26 U. S. Code and violation of Sec. 174 T-21 U.S. Code in counts 1, 2 3 and 5.

Sentence as follows.

Twenty months to sixty months and a fine of one hundred dollars on each of counts one, two, and three; said sentences by the counts to run concurrently; eight months to twenty-four months and pay a fine of one hundred dollars on count five; said sentence to take effect at the expiration of the sentence imposed in counts one, two and three.

Payment of fines be and is hereby suspended

Judge: Richmond B. Keech.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13, 686

GRANT MARTIN, APPELLANT

VS.

UNITED STATES, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a conviction in the United States District Court for the District of Columbia for Sale and Possession of Heroin in Violation of Sec's. 4704a, 4705a, Title 26, U. S. Code and violation of Sec. 174 T-21 U. S. Code. Jurisdiction of this appeal is conferred by Title 28 Section 2255 of the United States Code.

STATEMENT OF CASE

The petitioner was indicted in Criminal no. 544-55 for the alleged sale of Narcotic to Government Payed informer Clifton Reeder on March 29th, 1955. Who the Government alleged was the only eye witness to the Sale of Narcotic at my home located at 1503 First St. S. W., Washington, D. C.

The arrest taken place in the hallway of my home, "outside of my apartment." The police taken the petitioner back in the apartment and searched my apartment and in a sweater pocket the police found some narcotic.

The police arrested the petitioner without an arrest warrant or search warrant and searched the petitioner's home.

STATEMENT OF POINTS

1. Appellant was deprived of a fair trial because he was denied effective assistance of counsel as required by the United States Constitution and trial counsel willfully, knowingly went in conference with the court in a bench conference and conspired with the court to violate the petitioner's constitutional right.
2. Appellant was seriously prejudiced by the prosecution's failure to produce the Government witness Clifton Reeder and the narcotic Agent John Cannon.
3. Whether the petitioner should have been placed on trial for counts 4 and 5 of the indictment.
4. Was not the petitioner placed in double jeopardy in count 5 of the indictment.
5. Was not the petitioner illegally arrested on 4 and 5.

SUMMARY OF ARGUMENT

Appellant did not have a fair trial in that he was inadequately defended by Trial Counsel who (1) at a bench conference and corrupt the court and initiated a conspiracy to violate the petitioner's constitutional right that is provided by the U. S. Constitution. (2) That the whole trial was a mark of justice. (3) That the court was in agreement with my trial counsel at the bench conference out of the hearing of the petitioner and it is a violation of the 5th Amendment to be placed on trial for the alleged crime twice because it would be a clear case of double jeopardy.

I

ARGUMENT

Appellant urges that his trial counsel so conducted the petitioner's defense that the whole procedure was a violation of the United States Constitution of the 5th Amendment and the

14th Amendment of Due Process of Law and the 6th amendment of the U. S. Constitution.

The petitioner will cite from transcript of the petitioner's trial that was brought on before Judge Richmond B. Keech, "The Official Transcript by Roger E. Fry" and will be hereafter cited as "TR" for transcript.

Transcript "TR" page 67:

Mr. McLaughlin: Doctor Young.

The Court: Will you gentlemen come to the bench a moment, please?

(At the bench.)

The Court: Maybe you have already done it, Mr. Tinney, apparently this defendant knows where this fellow Skeeter Reeder or whatever his name is. Have you made any effort to get him or do you want him?

Mr. Tinney: I haven't because he said he was in the fish market and I checked and I don't even know where the address is. That is my difficulty.

The Court: Apparently neither side then knows where he is actually. Is that right?

Mr. Tinney: That is right, I honestly think so.

The Court: All right.

Mr. Tinney: If he is an informer I am not going to bring him in here. I don't think it is fair as a lawyer to expose him. I will try my case like a gentleman.

Transcript "TR" 68:

The Court: I don't have any doubt that you would do that, but my only thought was if you do want him, don't let's wait so we will be delayed.

Mr. Tinney: Oh, no.

The Court: You don't want him?

Mr. Tinney: No indeed.

(End of bench conference.)

Transcript "TR" 36

The Court: All right.

By Mr. Tinney:

Q Now Officer Holcumb is it a fact that this man is in the District of Columbia and his whereabouts are known to the Police Department at this time and to you?

A No sir.

(Counsel spoke to defendant.)

Q Now isn't it a fact that this man is working today at the Eagle Fish Market, Southwest?

A He may be.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed. Which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation. To be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor, and to have the Assistance of counsel for his defense. See 6th Amendment of the United States.

The remark made at the bench conference Transcript "TR" 67 by the petitioner trial attorney when he stated: If he is an informer I am not going to bring him in here, I don't think it is fair as a lawyer to expose him.

I will try my case like a gentleman.

The petitioner urged upon this Honorable Court that his trial attorney violated the petitioner's constitutional right at the Bench conference.

It is well settled by the courts that a lawyer is an officer of the Court. And Mr. Tinney Esq say's he is a gentleman

or like a gentlemen, but at the present time he has been found guilty of taken money from insane "people" and is disbarred.

The courts have stated:

The assistance of counsel under the sixth amendment contemplated that it be effective, Glasser v. United States 315 U.S. 60 76, 62S. ct. 457, 86 Ed (1949); Newfield v. United States 73 App. D. C. 174 182 2d 375 (1941) cert. denied 315 U. S. 798, that is it contemplates the guiding hand of an able and responsible lawyer, devoted solely to the interest of his client; who have ample opportunity to acquaint himself with the law and fact of the case see also the Justice Frankfurter in Rankin vs. People 72, S. Ct. 208, 209.

A defendant in a criminal case may not legally be found guilty except in a trial in which his constitutional rights are scrupulously observed. No conviction can stand no matter how overwhelming the evidence of guilt. If the accused is denied the effective assistance of counsel or any other element of due process of law without which he cannot be deprived of life or liberty. United States 215, F 2d 330, circuit Judge Wilbert K. Miller wrote in Coplan v. United States 1951 89 U. S. App. D. C. 103, 113, 191 F 2d 749 769 certiorari denied 1952, 342 U. S. 926, 72 S. Ct. 363, 96 L. Ed 690, circuit Judge Proctor writing in the same case said: Precious though the right to aid of counsel may be, as a safe guard to life and liberty, it is not a fetish to be worshiped blindly Id 89 U. S. App. D. C. at page 115 191 F 2d at page 761, which was not conducive to certainty in my mind yet I have a abiding doubt and I feel I should express it.

Page 63 (TR) Transcript and Page 69

Direct Examination--:

By Mr. McLaughlin

Q Your full name is what?

A James L. Young.

Q You are employed where?

A United States Treasury Department.

A And employed in what capacity?

Mr. Tinney: Excuse me a minute, may I come to the bench, if your honor please?

The Court: Yes sir.

Mr. Tinney: We might save a little time
(at the bench)

Mr. Tinney: I think I can very well stipulate on these narcotics without raising formal proof on it.

The Court: Have you talked to your man about it?

Mr. Tinney: Oh, yes, definitely.

The Court: He knows?

Mr. Tinney: Oh, he knows

The Court: There isn't any question of him coming back on it?

Mr. Tinney: He is not the type of fellow if he is convicted will come back and say that.

The Court: You are satisfied that they are?

Mr. Tinney: Oh, no question about it, your honor.

The Court: All right, we can do it in a very quick way then.

THE Petitioner's trial attorney and the trial judge in the instant case violated the petitioner's constitutional right from the above bench conference out of the hearing of the petitioner.

It has also been recently held that the testimony of the drug addicts themselves based on their sight and taste that the substance involved was really narcotic drugs adequately proved the Corpus Delicti United States v. Tramaglino 2 cir. 197; cf Pennacchio v. United States. 2 cir 263 Fed 66.

The usual procedure in a narcotics case is to have an expert testify to the fact that he made a chemical analysis of the substance, and that it was a narcotic drug, and further to have the narcotic itself introduced into evidence and iden-

tified with the defendant. Cromer v. United States 78 U. S. App. D. C. 400 142 F. 2d 692 Williams United States 55 App. D. C. 239 4 F 2d 432. People v. Brown 92 Cal. App.2D 360 206 P. 2d 1095. State v. Mas Sam Hing 89 Mont 178 295 Pac 1014, Chin Gum v. United States 1 cir; 149 F 2d 575. In Stadler v. People 59 Colo 159, 149 Pac 658, the court states; "That the powder contains cocaine must be proved as any other material fact beyond a reasonable doubt, before conviction can be had in this case.

Page 68 "TR" when Mr. Tinney, my trial attorney says, that he can stipulate on the narcotics without raising formal proof on it.

It is well settle that the burden of proof relies on the defender and my trial attorney willfully, knowingly violated the petitioner's constitution right out of the hearing of the petitioner and the jury. The whole trial was a mark of justice see Adam v. United States.

At page 69 #TR" When the court stated: There isn't any question of him coming back on it.

The petitioner maintain because he is a layman the court was in agreement with my trial attorney in violating the petitioner's constitutional rights. At the bench conference, and the petitioner did not know any thing about this fraud prejudice bench conference until he bought the transcript of the court procedure and he is coming back.

The trial court placed the petitioner in the danger of being tried twice for the same crime which violates the 5th amendment and it is double jeopardy "There can of course be no doubt that placing a person twice in jeopardy is beyond the jurisdiction of the District court and is remediable by Habeas Corpus" See Nelson petitioner 131 U. S. 176 (1889), Clawns vs. United States 70 River 70 App. "C. 107 104 Bens v. United States 266 Fed 152 159 2d Cir 1920.

This court stated Jackson v. United States 95 U.S. App. D. C. 328. 221 F 2d 883 (1955):

That the petitioner is not held responsible for what is said out of the hearing of the petitioner.

If this Honorable Court grant the relief the petitioner prays for before this Honorable Court and "order" a new trial and the petitioner be tried over again for the same alleged crime that the court new at the time of trial that he knowingly willfully violated the 6th amendment of the United States Constitution and the 5th and 14th Amendment of Due Process of Law. That was initiated and concocted by the petitioner's trial attorney.

The petitioner's constitutional rights were violated when the Government did not produce the government witness. The Petitioner's case is in point with the United States Supreme Court v. Albert Roviaro decided March 25, 1957 No. 58 October term in that "Justice Burton speaking for the Court:"

"Where the disclosure of an informer's identity is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege (or secrecy) must give way in these situations the trial court now may require disclosure and, if the government withholds the information, dismiss the action.

The petitioner ask the trial attorney before trial to file a motion to suppress the evidence and the trial attorney told the petitioner that the police had an authority to come in my home and search it. "It appear from the decision of this court in Marion D. Whitley Appellant v. United States of America Appellee No. 13347 decided October 11, 1956, in the Whitley decision came on before Edgerton, Chief Judge and Kretzmann and Bazelon, circuit Judges.

Edgerton, Chief Judge: This appeal is from a conviction under the narcotic laws. Appellant was arrested after an informer under police surveillance had entered and left a three-story rooming house in which appellant and others lived. In the house the informer had parted with so-called "marked money,"

meaning bills whose serial number were recorded, and acquired narcotics. At appellant's trial the police testified that the informer gave them information about a "particular room and the location of the room."

Some of the officers went through a window from the bathroom to a porch. From the porch, they looked into the bedroom and saw Meredith preparing to give herself a hypodermic injection. They entered the bedroom. Searched it and found narcotics. They asked appellant where her money was and she indicated it was in her purse. They took the marked money from the purse.

The appellant filed a motion to suppress the seized narcotics as evidence, and moved orally to suppress the money. The motion was granted as to the narcotics, but denied on the theory of consent, as to the money, we think the money as well as the narcotics should have been suppressed.

We find no evidence of voluntary consent. In Judd V. United States, as in this case, the alleged consent to a search and seizure was given by a person under arrest. In reversing the conviction the court stated: "a waiver or consent must be proved by clear and positive testimony, and it must be established that there was no duress or coercion..." 89 U.S. App. D. C. 64 66 190 F 2d 649 651.

At the petitioner's trial there was no proof that the police saw him sell any narcotics to the informer Reeder and the evidence was hearsay of the greatest degree.

There was no proof that the informer had told the police that the appellant was the "particular person" who had sold narcotics. Accordingly it does not appear that the officers had probable cause when they arrested Meredith to believe she had committed a felony. C.F. Wrightson v. United States 95 U. S. App. D. C. 390 392 222 F 2d 556 558, Wrightson v. United States U.S. App. D. C. F 2d (decided July 12, 1956).

"The arrest of Meredith also does not appear to have been

legal and therefore does not justify the search and seizure, since the porch from which the police saw Meredith was not open to the public, and the police reached it through a window, they had no right to be on the porch, whatever may be thought of their previous presence in the relatively public corridors of the roominghouse. It follows that what they saw from the porch, even if it gave them probable cause to believe that had committed a felony, did not justify them in arresting her, McDonald v. United States 335 U. S. 451.

Assuming Agundo that the U. S. Attorney will say that the search and seizure or the legality of the arrest was not raised in the District Court by my trial counsel, but it has been pointed out in the petitioner's motion that the trial attorney Mr. Tinney who is disbarred at the present time for stealing money from insane people that was trusted to him by the court. Therefore, it is a undisputed fact that lawyer Tinney could not be trusted. Lawyer Tinney, record show that he was a snake in the grass, but not as good because a Rattle Snake will warn you before he strikes. Lawyer Tinney is so low in mind and spirit, and caritor that he would Jeopardize the law of ethic that is upheld by the officer of the court and his profession that is one of the greatest sciences that is known to man that was handed down by God to Moses. The petitioner most fairly urged upon this court that my trial counsel was incompetent and the transcript verifies the fact when my trial counsel went in a bench conference which is pointed in this motion.

It is well settle that a lawyer is bound by the U. S. Constitution that he will defend a prisoner in a professional manner as contemplated by the 6th amendment of the United States and the 5th and 14th of Due Process of Law and all leading authority, state or federal.

The petitioner maintains upon this Honorable Court that the trial counsel was incompetent and did not prepare any legal defense for the petitioner.

STATUTE INVOLVED AND RULES INVOLVED

Act of December 17, 1914, C 1 Sec 38 Stat. 785 as amended
U. S. C. A. title 26 Sec. 4704 (a).

It shall be unlawful for any person to purchase, sell
dispense, or distribute narcotic drugs except in the ori-
ginal stamped package or from the original stamped package;
and the absence of appropriate tax paid stamps from nar-
cotic drug shall be prima facie evidence of a violation of
this subsection by the person whose possession the same may
be found.

Act of February 9, 1909 C. 100 Sec 2 (c). 35 Stat 614 as
amended U. S. C. A. Title 21 Sec 174 whoever fraudulently or
knowingly imports or brings any narcotic drug into the United
States or any territory under its controls or jurisdiction,
contrary to law or receives, conceals by sells or in any man-
ner facilitates the transportation concealment or sale or
brought in knowing the same to have been imported contrary to
law, or conspires to commit any of such act in violation of the
laws of the United States, shall be fined not more than \$2000.
and imprisoned not less than two or more than five years.

As to the arrest and seizure
U. S. Const. Amend. IV

The right of the people to be secure in their person,
house, papers and effects against unlawful searches and seizures,
shall not be violated, and no warrants shall issue but upon
probable cause, supported by oath or affirmation, and particularly
describing the place to be searched and the persons or thing
to be seized, Federal Rules of Criminal Procedure, Rule 41 (a)
"Motion for return of property and to suppress evidence, a per-
son aggrieved by an unlawful search and seizure may move the
District Court for the District in which the property and to
suppress for use as evidence anything so obtained on the ground
that (1) the property was illegally seized without warrant...
the Judge shall receive evidence on any issue of fact necessary
to the decision of the motion. If the motion is granted the

property shall be restored unless otherwise subject to lawful detention and shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the District where the trial is to had. The motion shall be made before trial or hearing unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion the court in its discretion may entertain the motion at the trial or hearing.

Act of June 25, 1948 C. 646 62 967 As amended 28 U. S. C.
Section 2255 (In pertinent part):

"2255 Federal custody; remedies on motion attacking sentence."

A prisoner in custody under sentence of a court established by act of congress claiming the right to be released upon the ground that the sentence was imposed in violation of the constitutional laws of the United States, or that the court was without jurisdiction to impose such sentence or that the sentence was in excess of the maximum authorized by law, or in otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make finding of fact and conclusion of law with respect thereto.

If the court finds that the Judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law, or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

An appeal may be taken to the court of appeal from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

A page 118 "TR" official transcript: and page 119.

The court: Very well Mr. Foreman or Madam Foreman, will you state, have you reached a verdict on what's.

The Foreman: Yes, Your Honor, we have on all counts but count 4.

The Court: Allright.

The Clerk: All counts except 4.

The Foreman: Yes.

The Clerk: Madam Foreman what say you as to the defendant Grant T. Martin on Count one of the indictment;

The Foreman: Guilty.

The Clerk: Count 2?

The Forewoman: Guilty

The Clerk: Count 3?

The Forewoman: Guilty

The Clerk: Count 5?

The Forewoman Guilty.

The Clerk: Members of the jury, your foreman says that you find the defendant Grant T. Martin Guilty on counts 1, 2, 3, and 5 and that is your verdict, so say you each and all?

(Affirmed nods).

The Court: Now, will counsel come to the bench again?

(At the bench)

Transcript (TR) at page 119

The Court: What is your pleasure?

Mr. McLaughlin: I make a motion to dismiss.

The Court: All right sir.

Mr. Tinney: I appreciate that.

(End of benchconference.)

Mr. McLaughlin: As to the verdict in the other count, if your Honor Please, the government makes a motion to dismiss at this time as far as the fourth count is concerned.

The Court: Your motion will be granted. Anything further from the defense counsel?

Mr. Finney: No, your Honor.

The Court: There being nothing further, your verdicts have been received unanimously as to counts 1, 2, 3, and 5 and the government having moved that count 4 be dismissed and it having been dismissed, your are discharged.

The defendant will be committed at this time.

(Whereupon, at 5:10 o'clock p.m. the hearing in the above case was concluded.)

Blackburger v. United States 284, U.S. 299 No. 374, argued November 24, 1931 Decided January 4, 1932.

"Two sales of morphine not in or from the original stamped package, the second having been initiated after the first was complete, held separate and distinct offense under Sec. 1, of the narcotics act.

"Section 1, of the Narcotic act forbidding sale or from the original stamped package and Sec. forbidding sale not in pursuance of a written order of the person to whom the drug is sold create two distinct offense and both are committed by a single act.

Mr. Justice Sutherland delivered the opinion of the court in the Blackburger decision stated: The petitioner was charged with violating provisions of the Harrison Narcotic Act: C 1 Sec. 1 Stat. 1057 1131 (U. S. C. Title 26 Sec 692) and C. 1 sec 2 38 Stat. 785 786 as amended (U. S. C. Title 26 696).

Construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English Words "United States v. V. Dotter Welch 1943 320 U.S. 277 280 64 S. Ct. 136 88 L Ed 48 See United States v. Walsh 1947 331 U. S. 432 434 67 S. Ct. 1283 91 L. Ed 1585.

The petitioner maintains that if the court dismissed count 4 then the court should have dismissed count 5. The petitioner maintains that if the jury could not agree on count 4, then it would be impossible for the jury to agree on count 5.

The statute provide for count 4 of the indictment provide as follow: See act of December 17, 1914 C. I Section 38 Stat 785 as amended U. S. C. A. Title 26 Sec 4704 (a) at page 11 of this motion and the petitioner is illegal sentence under count five (5) of the indictment and the instance of arrest. Illegal search and seizure taken place at the same time.

The lawyer was incompetent the record prove the fact as pointed out in this motion at the Bench Conference, as provided by the 6th amendment of the U. S. constitution.

The petitioner told the trial counsel where Reeder the government witness was working at and what markets; the police knew where he lived and also his family.

All the damaging evidence that was stated about the government paid informer that was working for the government who was an informer and addict, as stated by the police, but was kept away from the trial by the unethical tactics of the police and sanctioned by my trial counsel at the Bench Conference out of the hearing of the petitioner, violates due process of law, Reeder information was kept secret from the court. The Supreme Court has stated: "It means that Mezei should not be deprived of his liberty indefinitely except as the result of a fair open court hearing in which evidence is appraised by the court. Not by the prosecutor See No. 139

October term 1952 Edward J. Shaughnessy v. United States
of America ex rel Ignatze Mezei decided March 16, 1953,
"Justice Black with whom Mr. Justice Douglas concurs
desenting at page 2 and 3.

All respectfully submitted

Grant T. Martin
Grant T. Martin

Subscribed and sworn to before me this 18 day of April, 1957
a notary public.

Edward J. Flanagan
Notary Public
My Commission Expires April 25th, 1958

Certificate of Service

The petitioner Grant T. Martin does hereby certify that
a certified copy of this foregoing motion has been mailed
to the U. S. Attorney Mr. Oliver Gasch at the U. S. Court-
house Washington, D. C.

Grant T. Martin
Grant T. Martin

Subscribed and sworn to before me this 18 day of April, 1957
a notary public.

Edward J. Flanagan
Notary Public

My Commission Expires April 25th, 1958

BRIEF FOR APPELLEE

**United States Court of Appeals
For the District of Columbia Circuit**

No. 13,686 *United States Court of Appeals
For the
District of Columbia Circuit*

FILED

MAY 17 1957

GRANT T. MARTIN, Appellant *Joseph W. Stewart*
v. **CLERK**

UNITED STATES OF AMERICA, Appellee.

**Appeal From the United States District Court for the
District of Columbia**

OLIVER GASCH,
United States Attorney.

LEWIS CARROLL,
ARTHUR J. McLAUGHLIN,
ALFRED BURKA,
*Assistant United States
Attorneys.*

No. 13,686

QUESTION PRESENTED

In the appeal from the prosecution and conviction of a case involving violation of the Federal narcotic laws, where the evidence adduced by two police officers and a United States Chemist showed that appellant sold 100 capsules of heroin to a special employee (who was not present to testify at trial) and that a bag containing heroin was found in appellant's sweater next to his bed in the apartment where the aforesaid sale occurred, in the opinion of the appellee, the question presented is:

Was a second motion to vacate sentence filed pursuant to the provisions of 28 U.S.C. § 2255 properly denied.

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**United States Court of Appeals
For the District of Columbia Circuit**

No. 13,686

GRANT T. MARTIN, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

**Appeal From the United States District Court for the
District of Columbia**

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On March 29, 1955, appellant was arrested by a member of the Metropolitan Police Department of the District of Columbia and taken before the United States Commissioner for a preliminary hearing which appellant waived (R. 1). On June 6, 1955, an indictment was filed in the District Court charging appellant with five violations of the narcotic laws of the United States (R. 5-6). A copy of the indictment was mailed to appellant who was free on bond. On June 10, 1955, appellant, accompanied by his retained counsel, William A. Tinney, Esq., appeared at

arraignment and entered a plea of not guilty to the indictment (R. 7). Being free on bond, appellant returned to Court, with Mr. Tinney, on December 1, 1955, whereupon a jury was selected and sworn, and trial commenced before Judge Richmond A. Keech (R. 8).

The prosecution introduced the testimony of two police officers and a United States Chemist. Clifton Reeder, not present at trial, hereafter referred to as a special employee of the Police Department, was taken to Police Headquarters by the testifying officers at about 11:30 P.M. on March 28, 1955 (R. 50) where he made a telephone call (R. 51). As a result of this call, Reeder was searched and given \$100 of police funds, the serial numbers of which had been recorded (R. 52-86).¹ Officers Holcomb and Panetta, accompanied by Agent Gannon of the Federal Narcotics Bureau, drove Reeder to the vicinity of 1500-First Street S. W. (R. 52-87), and parked the car about one block from the appellant's apartment (R. 108). Reeder entered the vestibule of 1503 First Street, S. W. (R. 52), waited a moment (R. 80), and entered apartment No. 2 (R. 52, 88). The police officers took up position (R. 101-102) to await the pre-arranged signal of Reeder if and when he made an illegal purchase of narcotics (R. 53, 88). Agent Gannon covered the rear of the premises (R. 101-102). About five minutes after Reeder entered the apartment he reappeared at the door with appellant and gave the pre-arranged signal (R. 53). Officer Holcomb stepped forward, obtained a bag containing 100 capsules of a white powder (R. 54) upon which were no tax stamps, (R. 56)² and arrested appellant (R. 57-89). When the officer placed appellant under arrest he took from appellant's hand some money (R. 57-89)³ which was thereafter

¹ The search of Reeder disclosed no money, narcotics, or any narcotic drug order form issued by the Secretary of the Treasury (R. 51). Although the search did not include a search of the body cavities (R. 61-66), Officer Holcomb did search Reeder's arms, pockets, sleeves, shoes, sox, and the search included a "patting down" (R. 61-66, 97-100).

² Government Exhibit #1.

³ Government Exhibit #2.

determined to be the previously "marked" money given Reeder (R. 57-89). The officers then took appellant into his apartment (R. 1), and searched the premises. Officer Panetta found a bag containing a white powder in a sweater belonging to appellant (R. 89-90)⁴ hanging on a chair near appellant's bed (R. 74-75). No tax stamps were on the bag (R. 90).

Later, at Police Headquarters, appellant admitted that he had received the "marked" money from Reeder for the 100 capsules, and that he had obtained the bag of white powder from "Pete" (R. 83-84, 91-92). The capsules and powder had been taken by the Officers to headquarters (R. 58-59), placed and sealed in an envelope,⁵ and delivered to Dr. James L. Young, the United States Chemist, who opened the envelope (R. 113), analyzed the substances, and delivered them to the prosecutor at time of trial (R. 115).

Counsel stipulated that Dr. Young was an expert (R. 112). The Doctor then testified that the capsules in question contained a mixture of heroin hydrochloride, quinine hydrochloride, and sucaryl. The net weight was 97.2 grains and the heroin hydrochloride content was 16.2 per cent (R. 114). The powder consisted of 299.6 grains of a mixture of heroin hydrochloride, quinine hydrochloride, and sucaryl, which was 15.3 per cent heroin (R. 114). Both the capsules and the bulk powder contained derivatives of opium (R. 114). No tax stamps or order blank was affixed to either (R. 115).

The prosecution exhibits were admitted into evidence (R. 115), and after closing arguments by counsel, the court instructed the jury (R. 150-159). The jury retired to seek a verdict, and found appellant guilty on counts 1, 2, 3 and 5 (R. 161). The jury requested additional instruction as to count 4 but that count was dismissed (R. 162).

On December 23, 1955, appellant was sentenced to be imprisoned for a period of from twenty months to sixty

⁴ Government Exhibit #3.

⁵ Government Exhibit #1a.

months and to pay a fine of \$100 on each of counts 1, 2, and 3, the sentences to run concurrent, and to be imprisoned for a period of from eight months to twenty-four months on count 5, to be consecutive to sentence imposed on the first three counts (R. 10). On March 21, 1956, appellant filed pro se a motion to vacate sentence, or in the alternative to grant a new trial (R. 11-17)⁶ which was denied on the basis that it contained "no substantial issue of fact" and was "without merit" (R. 18). Appellant's application for leave to proceed on appeal in forma pauperis filed April 9, 1956, was denied on April 11, 1956, for similar reasons. A second motion to vacate sentence was filed pro se on October 26, 1956,⁷ (R. 19-37), and was denied on grounds that there was raised no substantial issue of fact and that the sentence was lawful, on November 11, 1956. The instant appeal (fee paid) was filed therefrom on November 26, 1956 (R. 39).

STATUTES INVOLVED

Title 21 U.S.C. § 174 provides:

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than \$2,000 and imprisoned not less than two or more than five years.
• • •

⁶ The basis for relief was alleged to be that appellant was not faced with his accuser (Reeder) at trial, illegal search and seizure, and that the sentence was in excess of that authorized by law.

⁷ The basis for relief alleged in the second motion to vacate was that the sentence was illegal, the indictment was erroneous because duplicitous, double jeopardy, illegal search and seizure, the fact that Reeder did not testify, and a bare allegation of ineffective assistance of counsel.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Title 26 U.S.C. § 4704(a)—General requirement provides:

It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Title 26 U.S.C. § 4705(a)—General requirement provides:

It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

Title 26 U.S.C. § 7237(a) provides in pertinent part:

Whoever commits an offense or conspires to commit an offense described in part I or part II of subchapter A of Chapter 39 for which no specific penalty is otherwise provided [such as 26 U.S.C. 4704(a), 4705(a), supra] shall be fined not more than \$2000 and imprisoned not less than 2 or more than 5 years. For a second offense, the offender shall be fined not more than \$2000 and imprisoned not less than 5 or more than 10 years. For a third or subsequent offense, the offender shall be fined not more than \$2000 and imprisoned not less than 10 or more than twenty years.

Title 28 U.S.C. § 2255 provides, in pertinent part:

Federal custody; remedies on motion attacking sentence.—A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence

was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

SUMMARY OF ARGUMENT

The motion to vacate sentence was properly denied as a subsequent motion to vacate; the files and records of the case conclusively show that appellant was entitled to no relief; and matters alleged in the motion were not properly before the Court.

Assuming *arguendo* that appellant's contentions were validly raised, each is without merit.

ARGUMENT

I

APPLICANT'S MOTION TO VACATE WAS PROPERLY DENIED

Appellant's motion to vacate sentence was properly denied, as the motion and the files and records of the case show conclusively that appellant was entitled to no relief. Appellant had filed his first motion to vacate sentence on March 21, 1956 (R. 11-17). The basis for the requested relief was that appellant was not confronted with his accuser (Special Employee Reeder), that appellant was the victim of an illegal search and seizure, and that the sentence was in excess of that authorized by law. This motion was denied (R. 18) with the notation that there was presented no substantial issue of law and that the motion was without merit. After an appeal in forma pauperis was denied by the trial court on similar grounds and that the proposed appeal was not taken in good faith, some six months thereafter, appellant filed a second motion to vacate sentence.

This motion again raised the contentions that appellant was given a sentence in excess of that authorized by law, that appellant was the victim of an illegal search and seizure, and that the special employee should have testified at trial. The motion also raised new matters not mentioned in the first motion to vacate. Appellant added contentions that the indictment was duplicitous, that he was placed in double jeopardy, and the bare allegation that counsel was ineffective. The motion was denied (R. 38), it appearing to the court that "upon consideration of the

... motion to vacate ... and the record herein, ... there is no substantial issue of fact and the sentences imposed on each count were lawful ..."

The files and records of the case, including the first motion to vacate, clearly showed that appellant was entitled to no relief. The pertinent provision of 28 U.S.C. § 2255 provides that: "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."⁸

In addition, the claims for relief as set forth by appellant are without merit. Each of the allegations involve either an error of law or an error of fact. This Court has held that a motion to vacate may not be used as a substitute for appeal, and that matters such as raised by appellant are not proper subjects for such a motion. *Cf. Adams v. United States*, 95 U.S. App. D.C. 354, 222 F. 2d 45 (1955); *Hanley v. United States*, 95 U.S. App. D.C. 400, 222 F. 2d 566 (1955).

However, assuming *arguendo* that the contentions of appellant were properly raised by the motion to vacate, each contention is without merit.

A. The Evidence Presented Was Sufficient Upon Which to Base a Conviction and the Testimony of the Special Employee Was Not Necessary to a Proper Trial

Appellant's contention of error in regard to the failure of the prosecution to present the testimony of Clifton Reeder, the special employee of the Police Department, and the testimony of Agent Gannon of the Federal Bureau of Narcotics is clearly without merit. It is well settled in this jurisdiction that there may be sufficient evidence upon which a jury may convict in a case involving an illegal

⁸ It is well established that when more than one motion to vacate sentence and set aside judgment is filed pursuant to 28 USC § 2255, whether or not any such motion after the original one will even be afforded consideration is within the discretion of the court. *Birtch v. United States*, 173 F.2d 316 (4 Cir. 1949), *cert. denied*, 337 U.S. 944; *Moss v. United States*, 177 F.2d 438 (10 Cir. 1949); *United States v. Brown*, 207 F.2d 310 (7 Cir. 1953); *Corcoran v. United States*, 231 F.2d 449 (7 Cir. 1956); *Dunn v. United States*, 234 F.2d 219 (6 Cir. 1956); *Johnson v. United States*, 213 F.2d 492 (5 Cir. 1954).

narcotic transaction wherein an "informer" is involved, even where the "informer" does not testify, or does not attend the trial.⁹ *Smith v. United States*, — U.S. App. D.C. — (No. 13,519, decided November 26, 1956); *Neal v. United States*, 94 U.S. App. D.C. 418, 215 F. 2d 32 (1954); *Dear Check Quong v. United States*, 82 U.S. App. D.C. 8, 160 F. 2d 251 (1947); *Higgins v. United States*, 81 U.S. App. D.C. 371, 160 F. 2d 222 (1946).

It is also well settled that the prosecution, in a criminal trial, is not under the duty to place upon the witness stand every person who may have some knowledge of the crime which is the subject of the trial. *McQuaid v. United States*, 91 U.S. App. D.C. 229, 198 F. 2d 987 (1952), *cert. denied*, 344 U.S. 929; *McGuinn v. United States*, 89 U.S. App. D.C. 197, 191 F. 2d 477 (1951); *Curtis v. Rives*, 75 App. D.C. 65, 123 F. 2d 936 (1941); *Jordon v. Bondy*, 72 App. D.C. 360, 114 F. 2d 599 (1940).

From the evidence in the instant case, it is apparent that there was sufficient evidence presented upon which the jury could return a verdict of guilty. The special employee was searched well,¹⁰ given "marked money" and sent to make the purchase. He gave the officers the narcotics at the door to appellant's apartment after remaining therein for five minutes, and appellant had the money in his hand. Other narcotics were discovered in appellant's sweater in his bedroom. Agent Gannon's testimony could have been only cumulative and was not necessary under the facts.

B. Appellant Was Represented at Trial by Capable, Diligent, Experienced, and Effective Counsel of His Own Choice

Appellant's contention of ineffective counsel is entirely without merit. Appellant's entire brief is filled with a

⁹ It should be noted that neither the Police Officers nor counsel for appellant knew where Reeder could be located (R. 60, 78, 79, 93, 110).

¹⁰ The search in the instant proceeding was thorough. Reeder was taken to the scene of the purchase in a police vehicle and was under direct observation except for the few minutes in appellant's apartment. Cf. *Fletcher v. United States*, 81 U.S. App. D.C. 306, 158 F.2d 936 (1946).

vitriolic, and totally baseless attack upon his counsel. Appellant alleges that his retained counsel was ineffective and that he was thus deprived of a Constitutional right.¹¹

Appellant several times alleges that his counsel has been disbarred (Br. 5, 10). This is pure fabrication by appellant. Mr. Tinney is presently on the roll of attorneys in both the District Court and this Court. He has never been disbarred, and is not presently disbarred.

Appellant contends (Br. 3-5) that counsel was ineffective because he did not want Reeder at the trial. Firstly, it was not necessary to have him at the trial (as treated elsewhere herein). Secondly, Mr. Tinney might well have preferred that further damaging evidence that could be given by Reeder was better left unsaid before the jury as a matter of trial tactics.¹² Thirdly, Reeder could not be located (R. 60, 78, 79, 93, 110).

Appellant falsely alleges that counsel was rendered ineffective because he stipulated to the proof of the narcotic drugs involved (Br. 6). This contention is without merit also. Appellant contends that he was entitled to have an expert testify to the content of the alleged narcotics, and to have the substance admitted into evidence (Br. 6-7). In the instant proceeding that is exactly what happened. The capsules involved were numbered for identification (R. 55), as was the bulk powder (R. 58). The chemist, Dr. James L. Young, testified as to the weight and chemical contents of both the capsules and the bulk powder (R. 114), and they were admitted into evidence (R. 115).

In addition, the trial court had before it in appellant's motion only a bare allegation of ineffectiveness of counsel

¹¹ It may be noted that appellant retained Mr. Tinney. Furthermore, he had no complaint in regard to counsel at trial. Nor did he allege counsel was ineffective in his first motion to vacate filed March 21, 1956 (R. 11-17) and in the appealed from second motion to vacate filed October 26, 1956 (R. 19-37) appellant only makes the bare allegation that counsel was ineffective because he failed to move to suppress the evidence (R. 20). Many allegations contained in appellant's brief are new, and were not raised in the court below.

¹² The defense argument to the jury (R. 119-147) was vigorous, complete, and stressed greatly the weakest parts of the case presented by the prosecution.

(R. 20). This is not sufficient. Cf. *Diggs v. Welch*, 80 U.S. App. D.C. 5, 148 F. 2d 667 (1945), *cert. denied*, 325 U.S. 889; *Dorsey v. Gill*, 80 U.S. App. D.C. 9, 148 F. 2d 857 (1945), *cert. denied*, 325 U.S. 890 (1945).

C. Appellant's Sentence Was Not in Excess of That Authorized by Law. Nor Is the Indictment Duplicious

Appellant contends in his motion to vacate that the sentence imposed by the court is illegal, and that the indictment is duplicious, Counts Four and Five thereof being the same respectively as Counts One and Two.

It is immediately apparent upon a perusal of the indictment that the indictment contains no duplicious counts. Counts One, Two, and Three of the indictment are concerned with the transaction between appellant and Reeder of the disposition of the 100 capsules (Government exhibit No. 1), while the last two counts are predicated upon the bulk powder (Government exhibit No. 3) found in appellant's sweater in his bedroom. The indictment recites in Counts Two and Three that the narcotics referred to in those counts are the same narcotics referred to in Count One of the indictment, i.e. 100 capsules. Count Five recites that the narcotics referred to in that count are the same narcotics mentioned in Count Four, i.e., the bulk powder in the bag.

In regard to appellant's contention that he was placed in "double jeopardy" (R. 22) because of the consecutive sentence imposed by the court on Count Five, and the corollary contention that the sentence was thus in excess of that imposed by law, it is clear that such contention is without merit. The fact that each count in the indictment required some element of proof that none of the other counts required is obvious from the face of the indictment. It is well established that consecutive sentences may be imposed by the court on separate counts of the same indictment.¹³

¹³ *Beecham v. United States*, 218 F.2d 258 (10 Cir. 1955); *Everett v. United States*, 227 F.2d 457 (6 Cir. 1955); *United States v. Brown*, *supra*; *Normandale v. United States*, 201 F.2d 463 (5 Cir. 1953).

Appellant raises issue with the fact that he received a maximum sentence of seven years imprisonment, although the "Boggs Act" forbids the sentence of a first offender to be in excess of five years. It has been held that trial court may impose consecutive sentences on separate counts of an indictment even where there has been but one sale, *Blockburger v. United States*, 284 U.S. 299 (1932). This Court has recently affirmed denial of a motion to vacate based on similar grounds to those alleged in this appellant's motion in the case of *Gore v. United States*, — U.S. App. D.C. —, No. 13,493, decided April 25, 1957.¹⁴

In addition, it should be noted, that appellant received concurrent sentences on the first three counts which all were concerned with the capsules. The consecutive portion of the sentence was concerned with the bulk powder. Appellant was tried, convicted and sentenced, not for one offense, but four separate offenses, and his sentences although totaling a possible seven years confinement, did not exceed the maximum authorized by law for a first offender on each individual count. Appellant has indeed received lenient treatment from the court, for the sentences on counts two and three could have been ordered to run consecutive to count one and each other *seriatim*. Cf. *Gore v. United States*, *supra*.

D. The Evidence Was Properly Taken Into Custody by the Officers

Appellant contends that the narcotic drugs were seized illegally. This contention is without merit. Upon Reeder's signal, the officers certainly had probable cause to arrest appellant, and the search and seizure following was certainly not unreasonable. Cf. *United States v. Rabinowitz*, 339 U.S. 56 (1950). In any event, such contention may not be raised by a motion to vacate. *Adams v. United States*, *supra*; *Hanley v. United States*, *supra*.

¹⁴ The Court cited favorably: *United States v. Brisbane*, 239 F.2d 859 (3 Cir. 1956); *United States v. Lewis*, 227 F.2d 524 (2 Cir. 1955), cert. denied, 350 U.S. 954 (1956); *Everett v. United States*, *supra*; and *Beecham v. United States*, *supra*. See also *Greene v. United States*, — U.S. App. D.C. — (No. 13,621, decided May 16, 1957).

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

OLIVER GASCH,
United States Attorney.

LEWIS CARROLL,
ARTHUR J. McLAUGHLIN,
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Attorneys.*

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13636

FRED A. SEATON, SECRETARY OF THE INTERIOR, APPELLANT

v.

THE TEXAS COMPANY, A CORPORATION, APPELLEE

AND

No. 13637

JOHN SNYDER, APPELLANT

v.

THE TEXAS COMPANY, A CORPORATION, APPELLEE

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

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United States Court of Appeals

For the

District of Columbia Circuit

FILED

FEB 11 1957

Joseph W. Stewart

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In the United States District Court for the District of Columbia

Civil Action No. 4405-'54

THE TEXAS COMPANY, A CORPORATION, ADDRESS: 135 E. 42ND
STREET, NEW YORK, NEW YORK, PLAINTIFF

v.

DOUGLAS MCKAY, INDIVIDUALLY AND AS SECRETARY OF THE
INTERIOR, ADDRESS: INTERIOR DEPARTMENT, DEFENDANT

*Complaint for a mandatory injunction in the nature of
mandamus*

(Filed October 15, 1954)

1. This Court has jurisdiction of this proceeding by virtue of the provisions of 5 U. S. C. 1009, in order to hold unlawful and set aside the action of the defendant, hereinafter described, because such action was arbitrary, capricious, an abuse of discretion, contrary to plaintiff's constitutional rights, in excess of statutory jurisdiction, authority, and limitation, and short of statutory right, and otherwise not in accordance with law.

2. The plaintiff, The Texas Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware; and, in relation to the subject matter of this proceeding, is engaged in drilling wells for the production of oil and gas, and the leasing (or the taking of assignments of leases) of mineral deposits thereof and rights therefor upon land owned by the United States.

3. The defendant, Douglas McKay, is the Secretary of the Interior of the United States of America, and is charged by statute with the lawful performance of duties under the mineral leasing laws of the United States, including the Act of February 25, 1920, as amended, (30 U. S. C. 181, *et seq.*) and the Act of August 7, 1947 (30 U. S. C. 351, *et seq.*). Defendant is sued herein both as an individual and in his capacity of the Secretary of the Interior.

4. Under and by virtue of the aforesaid laws, defendant was and is authorized, empowered, directed and required to lease mineral deposits of and rights to oil and gas in lands of the United States, not within the known geologic structure of a producing oil or gas field, whether such lands be public domain or acquired lands, and whether the mineral deposits and rights therein be public domain or acquired. As used herein and in said statutes, "public domain" means lands and/or deposits and rights therein initially and continuously owned by the United States; and "acquired" means lands and/or deposits and rights therein acquired from others either in the first instance or by re-acquisition from others to or through whom the United States had previously patented the same. If the United States had patented public domain lands to a patentee with the reservation of mineral deposits and rights therein, such deposits and rights remained "public domain" deposits and rights, and upon re-acquisition of such lands by the United States, such lands are considered as acquired lands. While from time to time in this complaint mention may be made of the leasing of lands, the phrase is intended always to refer to the leasing of mineral (gas and oil) deposits in and rights to said lands, and not to the leasing of the surface land itself.

5. The controversy in this case revolves around the leasing of oil and gas rights and deposits in forty acres of land, being the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of section 7 in Township 153 N., Range 95 W., 5th Principal Meridian, McKenzie County, North Dakota. These forty acres are part of 2080 acres hereinafter referred to. While the surface land of the forty acres was acquired land, the oil and gas deposits therein were public domain, since the United States had patented the land to one Danielson in 1940 with a reservation of said mineral rights, and thereafter in 1942 Danielson reconveyed the land to the United States.

6. On or about April 19, 1948, one Thomas G. Dorough—plaintiff's assignor as hereinafter averred—filed with the Department of the Interior of the United States public domain application (Bismarck 025004) for a lease of the oil and gas deposits and rights in the aforesaid 2080 acres. On or about January 25, 1949, an Interior Department official charged with duties relating to said application, informed the said Dorough

in writing that part of said 2080 acres was public domain land (such part was described as being in sections 5 and 8 in the aforesaid Township), and that the balance (which included the forty acres in question) was acquired land; and suggested to Dorough that he file a new acquired-land application for the latter. On or about February 3, 1949, the said Dorough, in writing, requested the Interior Department to treat his application, Bismarck 025004, as an acquired-lands application, and thereafter, on December 1, 1951, the Interior Department issued its lease to the said Dorough, which lease included the forty acres in question. Also, on or about February 3, 1949, the said Dorough filed a supplemental application for a lease of the lands which the Interior Department official had informed him were public domain lands, and a lease of such lands was issued to him under date of April 1, 1949.

7. In the meantime, on or about May 11, 1951, one John Snyder filed with the said Interior Department a public domain application for a lease of the oil and gas deposits and rights in certain lands of the United States, including the forty acres in question. Such application, as to the forty acres, was at first denied upon the ground that acquired land was involved, but other land applied for was leased to the said Snyder under date of November 1, 1952. The said Snyder appealed from the aforesaid denial and prevailed when it was discovered by the Interior Department that the mineral deposits and rights in said forty acres were not acquired but were public domain. Accordingly, an "Amendment to oil and gas lease" was issued by the Interior Department to the said Snyder on or about April 24, 1953, covering said forty acres, said "Amendment" reciting that "for valid reasons" said forty acres had not been included in the lease of November 1, 1952.

8. After the oil and gas deposits and rights in the aforesaid forty acres had been leased to the said Dorough on December 1, 1951, and before the November 1, 1952, lease had been issued to the said Snyder, the said Dorough, for a good and valuable consideration and pursuant to and in accordance with law, on April 21, 1952, duly assigned his said lease to the plaintiff; and on or about June 1, 1952, defendant's predecessor duly approved said assignment, and plaintiff then and there

became the lessee under the Dorough lease, entitled to all the rights thereof.

9. Based upon said lease, as well as other leases covering contiguous and neighboring lands in said Township, plaintiff has undertaken vast prospecting and drilling operations in said Township, expending hundreds of thousands of dollars, and has successfully drilled oil wells in said Township near the aforesaid forty acres; and plaintiff is advised and believes that there is a very strong likelihood that there are valuable and large oil deposits in and under said forty acres, which are estimated at many thousands of dollars, and far in excess of three thousand dollars, which sum, if relevant here, is the minimal monetary jurisdiction of this Court.

10. On or about January 22, 1954, the said Snyder, without the knowledge of the plaintiff or of the said Dorough, wrote to the Interior Department requesting the cancellation of plaintiff's lease upon the forty acres in question upon the pretext and excuse that the mineral deposits in said land were leased to plaintiff's assignor as acquired and not as public domain, despite the fact that the United States owned said land and defendant's Department actually leased the same to the said Dorough, as it had the right to do. Without notice to plaintiff or to the said Dorough, and without an opportunity to either to be heard, defendant's subordinate, on or about February 16, 1954, erroneously and unlawfully canceled plaintiff's lease of said forty acres and then notified plaintiff accordingly.

11. Within the thirty days allowed for doing so, plaintiff appealed to defendant from the aforesaid decision of February 16, 1954, complaining both of lack of notice and opportunity to be heard prior thereto, and of the other unlawfulness of said decision to cancel its lease. Written arguments were submitted to defendant, who affirmed his subordinate on August 10, 1954, by an opinion of the Solicitor of the Department, promulgated for defendant and as his act and deed pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (Sec. 23, Order No. 2509, as revised; 17 F. R. 6794). A true copy of said opinion is annexed hereto and made a part hereof. The chief basis of the said opinion will be found on page 8 thereof where it is stated:

Since Dorough had sought as acquired land, land available for leasing only as public domain, his application was not a proper one and failed to earn him a preference right to a public land oil and gas lease.

Said statement is completely erroneous since not only had Dorough filed the first qualified application for a lease of the forty acres as public domain land, but defendant's predecessor had issued a lease of said land to plaintiff's assignor, and said lease was outstanding and in existence when defendant's predecessor unlawfully attempted to lease said land to the said Snyder.

12. Section 3 of the Act of August 7, 1947 (30 U. S. C. 352) provides that defendant shall make leases of acquired mineral deposits and rights "under the same conditions as contained in the leasing provisions of the mineral leasing laws [which includes the Act of February 25, 1920—30 U. S. C. 181], subject to the provisions hereof." No provision of the 1947 Act has any material effect upon the question here involved. Section 10 of the 1947 Act (30 U. S. C. 359) provides that the Secretary of the Interior shall prescribe the same rules and regulations in respect of that Act as those under the prior Act "to the extent that they are applicable." Such rules and regulations are entirely applicable insofar as the subject matter here concerned is involved. Plaintiff avers that there is absolutely no difference in legal effect between a lease of oil and gas deposits and rights in public domain lands and one of such deposits and rights in acquired lands.

13. The said Dorough was issued a prior lease on December 1, 1951, covering the land here in controversy, which lease is identical to a noncompetitive public domain lease, in all the details thereof, except that it bears a "BLM-A" acquired lands designator rather than a "BLM" public domain designator. Defendant has no right to complain of this error caused by his subordinate's own erroneous advice and instructions, since land has been leased upon precisely the terms whereby defendant is authorized to lease it, and through the Bureau of Land Management, the proper governmental bureau for handling these lands, whether acquired or public domain. In this respect the said Acquired Lands Act of Au-

gust 7, 1947, though in form a separate act, is actually amendatory of the preexisting mineral leasing laws, and is intended to bring acquired lands into the same leasing status as other federal lands. Accordingly, the said Acquired Lands Act of August 7, 1947, simply refers one to the terms and procedures of the General Mineral Leasing Act of February 25, 1920 for the terms and procedures for acquired lands leasing. Indeed, the said Acquired Lands Act is not antagonistic to any of the mineral leasing acts referred to in the 1947 Act, but is complementary to those acts; and there is no statutory basis for voiding a lease covering public domain lands which may have been issued pursuant to an acquired-lands application and which bears an acquired-lands designator.

14. Plaintiff has exhausted its administrative remedy, and has no further or other redress against defendant except to institute this proceeding, as outlined in the first paragraph in this Complaint.

15. Plaintiff says that it held a valid lease of the mineral deposits and rights in said forty acres; that defendant had no lawful right to cancel the same; that in doing so defendant acted arbitrarily and capriciously, abused his discretion, violated plaintiff's constitutional rights, exceeded his jurisdiction, authorization and limitation, and was without statutory right, and otherwise acted not in accordance with law; and, that by reason of the foregoing this Honorable Court should hold said action unlawful and set the same aside.

Wherefore, the premises considered, plaintiff demands judgment that this Court issue its injunctive order holding the aforesaid cancellation unlawful, and mandatorily directing the defendant to set the same aside.

WHITEFORD, HART, CARMODY
& WILSON,

By JOHN J. WILSON,

Attorneys for Plaintiff,

Address: 815 15th Street, NW., Washington, D. C.

STATE OF COLORADO,

County of Denver, ss:

I, Walter E. Will, one of the attorneys for the plaintiff, do solemnly swear that I have read the foregoing Complaint, and that I know the contents thereof; that I am authorized to make this verification of said Complaint; and that I verily believe the statements therein made to be true.

Walter E. Will.

WALTER E. WILL.

Subscribed and sworn to before me this 13th day of October 1954.

[NOTARIAL SEAL]

DONALD GUENTHER,

Notary Public.

My commission expires June 12, 1954.

THE TEXAS COMPANY, THOMAS G. DOROUGH, APPELLANTS,
JOHN SNYDER, INTERVENOR

A-27021

Decided August 10, 1954

Oil and Gas Leases—Acquired Land—Public Domain—First Qualified Applicant—Cancellation of Lease—Reinstatement of Application—Rules of Practice—Contest—Supervisory Authority of the Secretary.

Where an applicant files an application for an oil and gas lease on acquired lands which includes a tract of public land, he does not earn a preference right to an oil and gas lease on that tract as against an applicant who files a subsequent proper public domain application for an oil and gas lease on the same tract.

Where an acquired land oil and gas lease includes a tract of public domain land, the acquired land lease is subject to cancellation as to the tract of public domain land.

If the Department determines that a tract of public land which is not within any known geological structure of a producing oil or gas field will be made available for oil and gas development, the Department is under a mandatory duty, imposed by statute, to lease the land to the qualified person who first submits a proper application for it.

Where an applicant for a public land oil and gas lease acquiesces in an erroneous determination by a Bureau official that his application covers acquired lands and in the processing of his application as one for an acquired land lease, and action on his case as a public land application is closed, he will not be granted a reinstatement of his application as a public land application where the land has been leased to an intervening applicant pursuant to a proper public land lease application.

A contest will not be allowed where the grounds for an alleged contest are shown by the records of the Department.

When a matter pending before the Department of the Interior has been considered at the highest level in the Department, no interested party may be heard to complain of defective consideration at a lower level, since the Secretary of the Interior has authority under the law to assume jurisdiction at any stage of the proceedings.

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF THE SECRETARY

WASHINGTON 25, D. C., *August 10, 1954.*

A-27021

THE TEXAS COMPANY, THOMAS G. DOROUGH, APPELLANTS,
JOHN SNYDER, INTERVENOR

BLM-A 016898, BLM (ND) 023993.

Oil and gas lease for acquired lands canceled in part.

Affirmed; petition for reinstatement denied.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Texas Company has appealed to the Secretary of the Interior from a decision by the Chief, Division of Minerals, Bureau of Land Management, dated February 16, 1954, which canceled in part an oil and gas lease for acquired lands (BLM-A 016898) which The Texas Company holds as assignee of Thomas G. Dorough, the original lessee.

On April 19, 1948, Dorough filed with the Bismarck district land office an application for a noncompetitive oil and gas

lease pursuant to the act of February 25, 1920, as amended (30 U. S. C., 1952 ed., sec. 181 *et seq.*), covering 2080 acres of land situated in T. 153 N., R. 95 W., 5th P. M., McKenzie County, North Dakota. Included in this land was the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 7, the tract involved in this appeal. The application was given serial number Bismarck 025004 and held in the local office for processing. On January 19, 1949, Dorough wrote to the Bureau of Land Management office in Billings, Montana,¹ inquiring as to the status of his application. In this letter he stated:

Since filing the above numbered oil and gas lease application, I have learned that applications for acquired lands should be filed direct to Washington, D. C. Therefore, if any part of this application is considered acquired land, please accept this letter as formal notice that it is my desire that the matter be forwarded to your proper land office in order that an oil and gas lease can be issued.

The Regional Chief of Adjudication, Region III, replying to this letter on January 25, 1949, informed Dorough that of the lands included in Dorough's application, only certain lands in sections 5 and 8 were public domain land. He then stated:

In view of the fact that the above land is the only land that may be included in a lease under the leasing act of February 25, 1920, it is suggested that you file a new application covering the balance of the land. Such application should be filed direct in the Bureau of Land Management office in Washington, D. C. Your application should clearly show that it is an application for acquired land.

Dorough apparently did not file a new application. But on February 4, 1949, the Regional Chief of Adjudication forwarded three applications by Dorough, including Bismarck 025004, to the Director of the Bureau of Land Management,

¹ The land office at Bismarck, North Dakota, was discontinued as of the close of business on July 30, 1948, pursuant to Executive Order 9977, dated July 17, 1948 (13 F. R. 4033).

together with a memorandum in which he stated that he was attaching a letter from Dorough in each case showing that Dorough wanted the applications to be considered as for acquired land only.² He also informed the Director that Dorough had amended two other applications filed by him to include the public domain lands listed in the three applications being forwarded to Washington³ and that the cases as to the three applications being transmitted had been closed by the regional office.

The Washington office assigned acquired land serial numbers to the three applications and held them for processing. Application Bismarck 025004 became BLM-A 016898. By a decision dated October 29, 1951, Dorough was sent for execution acquired land oil and gas lease forms covering 1669.4 acres, which included the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 7. Following execution of the forms by Dorough, the lease was issued with an effective date of December 1, 1951.

Meanwhile, on May 14, 1951, John Snyder filed an offer to lease for oil and gas on form 4-1158⁴ embracing the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 7, among other land, with the Bureau of Land Management, Washington, D. C. The offer was numbered BLM (ND) 023993 and transmitted to the Billings land office for adjudication. The offer was rejected as to the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 7 by a decision of the Manager of the Billings land office dated October 23, 1952, on the ground that the tract had been patented without an oil and gas reservation to the United States. A lease BLM (ND) 023993, effective November 1, 1952, was issued for other of the lands applied for. Snyder appealed from the Manager's decision, alleging that the patent had contained an oil and gas reservation. The status of the tract was thereupon checked in the records of the Bureau of Land Man-

² The letter in the case of Bismarck 025004 was presumably Dorough's letter of January 19, 1949.

³ The public domain land in Bismarck 025004 was transferred to Bismarck 025003. See the Bureau's decision of October 29, 1951, referred to later in the text, in which the statement was made that the public domain land in Bismarck 025004 had been included in lease Bismarck 025003.

⁴ This is the form required by regulation (43 CFR, 1952 Supp., 192.42) to be used for applications for noncompetitive oil and gas leases pursuant to the Mineral Leasing Act of February 25, 1920, *supra*.

agement in Washington where it was ascertained that the land had been patented with an oil and gas reservation pursuant to the act of July 17, 1914 (30 U. S. C., 1952 ed., sec. 121 *et seq.*). Accordingly, on March 18, 1953, the Manager revoked his decision of October 23, 1952, as to this tract and on April 24, 1953, Snyder's lease was amended to include the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 7.

Snyder, by a letter to the Director of the Bureau of Land Management dated January 22, 1954, pointed out the conflict between his lease and Dorough's, which, by assignment approved by the Manager of the Billings land office on June 1, 1952, has been assigned to The Texas Company. On February 16, 1954, the Chief, Division of Minerals, Bureau of Land Management, held BLM-A (ND) 016898 for cancellation in part as to the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 7.

The Texas Company and Dorough filed a timely appeal to the Secretary (43 CFR, 1952 Supp., 221.75).

On March 22, 1954, Dorough filed a petition for the reinstatement of his original application, Bismarck 025004, with the Billings land office. On May 20, 1954, Snyder submitted a petition to consolidate Dorough's petition for reinstatement with the appeal from the decision of February 16, 1954.

The tract in dispute was entered (Bismarck 024344) by Selmer K. Danielson on March 26, 1934, under the provisions of the homestead act (43 U. S. C., 1952 ed., sec. 161 *et seq.*). On April 11, 1940, a patent (No. 1107828) was issued to Danielson in which the coal and the oil and gas deposits were reserved to the United States pursuant to the acts of June 22, 1910, and July 17, 1914, respectively (30 U. S. C., 1952 ed., secs. 81 *et seq.* and 121 *et seq.*). On January 2, 1942, Selmer K. and Helen Danielson reconveyed the tract to the United States by a warranty deed. The title has since then remained in the United States.

Thus, although the title to the surface of the land in dispute and to the nonreserved minerals have been reacquired by the United States, the title to the coal and oil and gas deposits has always been in the United States. Such reserved deposits are specifically made subject to leasing under the Min-

eral Leasing Act of February 25, 1920, as amended, by section 34 of that act (30 U. S. C., 1952 ed., sec. 182).

If the Department determines that a tract of public land which is not within any known geological structure of a producing oil or gas field will be made available for oil and gas development, it is under a mandatory duty imposed by statute to lease it to the first qualified person who files a proper application for it. 30 U. S. C., 1952 ed., sec. 226; *Transco Gas & Oil Corporation et ano.*, A-26436 (December 8, 1952). A lease issued in disregard of this obligation of the Department must be regarded as having been issued without authority of law and, indeed, in contravention of the plain statutory mandate. Such an oil and gas lease is subject to cancellation. *Transco Gas & Oil Corporation et ano.*, *supra*.

Dorough's original application for the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 7 (Bismarck 025004) appears to have been a proper application for a noncompetitive public domain oil and gas lease and a lease could have been issued on it. However, the greater portion of the acreage listed in the application covered acquired lands as to which the application would have had to be rejected. Thus when Dorough was informed on January 25, 1949, by the Regional Chief of Adjudication that the disputed tract was not public domain land, he amended another of his applications to include the public domain land first listed in Bismarck 025004. The Regional Chief of Adjudication then transmitted Bismarck 025004, with a letter from Dorough showing that he wanted the application to be considered as for acquired lands only, as an acquired land application to the Bureau of Land Management in Washington, where it was received in February 1949, and numbered BLM-A 016898. Prior to sending the application to Washington, the local office closed the case to Bismarck 025004. Thereafter Dorough's only valid application for the disputed tract was BLM-A 016898, an acquired land application filed in accordance with the pertinent regulation (43 CFR 200.5 (b)) with the Bureau of Land Management in Washington.

While Dorough's application was in this status, Snyder filed his application on May 14, 1951, with the Bureau of Land Management in Washington, from which it was sent to the Bill-

ings land office for adjudication in accordance with the procedure which was in effect at that time.⁵

Dorough's application was reached for processing in Washington after Snyder's had been filed but before the latter had been acted upon in Billings. At this stage there was a conflict as to the disputed tract between a properly filed public domain application and a prior acquired land application. Since Dorough had sought as acquired land land available for leasing only as public domain, his application was not a proper one and failed to earn him a preference right to a public land oil and gas lease. *E. A. Wight*, A-25408 (July 16, 1946); *G. G. Stanford*, A-26765 (November 9, 1953). His application therefore should have been rejected as to the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 7. *Id.*

Snyder's offer was filed under the proper statute and regulation and, as the first qualified applicant to file a proper application, he had earned a statutory preference right to a public land oil and gas lease for the land in question. He cannot be deprived of his statutory preference by a lease issued to another person in disregard of it.⁶ Therefore, in the absence of any other factors, the decision canceling The Texas Company lease as to the tract in question was correct.

Dorough's petition for the reinstatement of his original application (Bismarck 025004) as an application for a public land lease on the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 7 points up a substantial similarity between this case and the cases of *Charles D. Edmonson*, A-26834, *Maner Graham*, A-26921, and *Virgil Peterson et al.*, A-26932, decided in a single decision today. The basic fact situation involved in these cases is as follows: An application for a noncompetitive oil and gas lease is erroneously rejected on the ground that the land is withdrawn or that the land has been patented without a mineral reservation or for some other reason. The applicant does not appeal. Subse-

⁵At the time Snyder filed his application, there was no land office in North Dakota. Consequently his public domain application was properly filed in Washington in accordance with the pertinent regulation (43 CFR, 1952 Supp., 192.42 (b)).

⁶*Transco Gas & Oil Corporation, supra*; *Annie L. Hill et al. v. E. A. Culbertson*, A-26150-26157, August 13, 1951; *R. H. Reay v. G. H. Lackie*, A-24670 (August 12, 1947).

quently a lease is issued to a junior applicant for the same land. The senior applicant thereupon petitions for the reinstatement of his rejected application.

In the *Edmonson et al.* decision, it is held that by his failure to appeal from the rejection of his application, the senior applicant loses his preference right to a lease as against the subsequent applicant, even though the rejection was based upon an erroneous ground.

The situation presented in the immediate case is substantially similar. Dorough applied for a public land lease on the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 7. He was erroneously informed on January 25, 1949, by a Bureau official that the tract was acquired land and that a new application should be filed for the land. Dorough did not question this advice or appeal but instead acquiesced in it by permitting his application to be forwarded to the Director as an acquired land lease application.⁷ Action on his case as involving a public land application was closed. Thereafter, Snyder filed a proper application for a public land lease on the tract. Dorough's acquiescence in what was equivalent to a rejection of his public land application for the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 7 continued through his acceptance of an acquired land lease for the tract. It was not until a considerable time after Snyder had received his lease that Dorough attempted to reassert his rights under his original application. In accordance with the *Edmonson et al.* decision, it must be held that he had lost his preference right to a public land lease on the tract in question when he did not appeal from what was the equivalent of a rejection of his application for a public land lease on the land. Consequently, Dorough's petition for the reinstatement of his original application as to the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 7 must be denied.

The appellants contend that in any event they were entitled to a notice of contest pursuant to 43 CFR, Part 221,

⁷ The case record on Dorough's application contains a status sheet dated October 21, 1948, which carried the following item under "Conflicts": "Hd 024-344 Bis (O & G res'd act 7/17/14) as to NE SW sec. 7." This clearly showed that the oil and gas deposits in the tract had not been patented and later reacquired by the United States but that they had never lost their public domain status. If Dorough had checked the case file after receiving the erroneous letter of January 25, 1949, he would have noted the inconsistency between the letter and the status sheet.

but did not receive such notice, and that they were therefore deprived of an opportunity to answer or defend. The pertinent regulation governing the initiation of contests provides:

Contests may be initiated by any person seeking to acquire title to, or claiming an interest in, the land involved, against a party to any entry, filing, or other claim under laws of Congress relating to the public lands, because of priority of claim, or for any sufficient cause affecting the legality or validity of the claim, not shown by the records of the Bureau of Land Management. (43 CFR 221.1 (a).)

Thus, even assuming that a conflict between two applicants for an oil and gas lease may provide the basis for a contest, the fact that all of the matters affecting the validity of lease BLM-A 016898 are shown by the records of the Bureau of Land Management prohibits the initiation of a contest by Snyder. Margaret M. Redmond, A-25907 (August 21, 1950). This rule has been specifically applied to oil and gas matters. *Purvis v. Witt*, 49 L. D. 260 (1922).

As to the Appellants' assertion that they were deprived of an opportunity to answer or defend, it appears that the decision of February 16, 1954, canceling in part The Texas Company lease stated: "This action will become final thirty days from receipt hereof. The right of appeal is allowed. * * *" Within the 30-day period the appellants filed notice of appeal and thereafter have filed a brief and a reply brief. They have had an opportunity to support their position to the fullest extent. There is no indication that there are matters of fact or law which they have been unable to present for the consideration of the Department.

Although it might have been better practice for the Director of the Bureau of Land Management in this case to issue a notice to the appellants to show cause why their lease should not be canceled as to the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 7 (cf. 43 CFR, 1952 Supp., 192.42 (m)), the procedure followed in this case has not injured the appellants. The final authority in the Department to cancel the lease rests with the Secretary who may exercise his supervisory authority at any stage of the proceedings. *Levi*

Hughes et al., A-26612 (April 28, 1952). Thus the Secretary might in the first instance have assumed control of the proceedings to cancel the lease as to the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 7. If the Secretary had done so, the appellants could not properly contend that the Director should first have considered and decided the matter. The appellants, having had the opportunity to present their case fully at the highest level in the Department, cannot rightly complain of defective consideration below. (*Id.*)

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Chief, Division of Minerals, Bureau of Land Management, is affirmed and Dorrough's petition for the reinstatement of application Bismarck 025004 as an application for a public land lease on the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 7 is denied.

(Sgd) CLARENCE A. DAVIS,
Solicitor.

Answer

(Filed January 12, 1955)

FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted against the defendant.

SECOND DEFENSE

The United States is an indispensable party but it has not consented to be sued in this action.

THIRD DEFENSE

Mr. John Snyder is an indispensable party but he has not been joined as a party.

FOURTH DEFENSE

1. Defendant denies the allegations of paragraph 1 of the complaint.

2. Defendant admits that the plaintiff is a corporation organized and existing under the laws of the State of Delaware, and is without information sufficient to form a belief as to the other allegations of paragraph 2 of the complaint.

3. Defendant admits the allegations of paragraph 3 of the complaint.

4. Defendant admits that he is authorized to issue oil and gas leases covering certain lands and deposits owned by the United States under the Mineral Leasing Act of February 25, 1920, 41 Stat. 449, as amended, and the Mineral Leasing Act for Acquired Lands of August 7, 1947, 61 Stat. 913. Defendant is advised and believes that the other allegations of paragraph 4 of the complaint are conclusions of law which do not require answer and, therefore, they are neither admitted nor denied.

5. Defendant admits the allegations of paragraph 5 of the complaint.

6. Defendant admits the allegations of paragraph 6 of the complaint. With respect to the allegation that "On or about February 3, 1949, the said Dorough, in writing, requested the Interior Department to treat his application, Bismarck 025004, as an acquired lands application, * * *," defendant states that this written request is not in the Department of the Interior files, Bismarck 025004 or BLM-A 016898, but in view of plaintiff's allegation it is assumed that the written request was made and that it has been misfiled or otherwise misplaced. Further answering paragraph 6, defendant alleges:

On April 11, 1940, the United States issued a patent to Selmer K. Danielson for the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 7, the forty acres in controversy here. The patent provided that the coal and the oil and gas deposits were reserved to the United States. In 1942 Danielson and his wife reconveyed the tract to the United States by a warranty deed and title has since then been in the United States.

In April 1948 the published regulations of the Department of the Interior provided specifically that applications for oil and gas leases of public domain lands or deposits under the Mineral Leasing Act of February 25, 1920, as amended, must be filed in the District Land Office of the state where the land

was situated and that applications for oil and gas leases of acquired lands under the Mineral Leasing Act for Acquired Lands of August 7, 1947, must be filed with the Bureau of Land Management, Department of the Interior, Washington, D. C. The regulations relating to public domain lands or deposits required that certain information be included in applications for leases and the regulations relating to acquired lands provided for additional information to be furnished in applications for leases of those lands.

In April 1948, and at all times thereafter, the records of the Bureau of Land Management Office in Bismarck, North Dakota, and (after the closing of that office on July 30, 1948) in Billings, Montana, disclosed the status of land in North Dakota so far as its disposition by the United States was concerned. i. e., patented without reservation of minerals, patented with a reservation of minerals or unpatented with complete title in the United States. The records of the Bureau of Land Management in Bismarck, North Dakota, and later in Billings, Montana, contained no information concerning the reacquisition of lands by the United States, but that information and also information concerning the disposition of land by the United States were available in the lands records of McKenzie County, North Dakota.

On April 19, 1948, Thomas G. Dorough filed with the District Land Office, Bureau of Land Management, Bismarck, North Dakota, an application under the Mineral Leasing Act of February 25, 1920, as amended, for an oil and gas lease covering 2,080 acres, including the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 7. The application described approximately thirty-two separate parcels of land in nine different sections. Notwithstanding the provisions of the regulations of the Department of the Interior and the information available to Dorough from the records of the District Land Office of the Bureau of Land Management and the land records of McKenzie County, approximately twenty-three of the parcels included in the application were acquired lands. As to those parcels, the filing of the application in the District Land Office was contrary to the regulations of the Department of the Interior, the applications were defective in that they did not contain the information required in connection with applications for acquired

lands and those parcels could not be leased under the Mineral Leasing Act of 1920, as amended. Two of the parcels described in the application were in private ownership. In a letter dated January 19, 1949, addressed to the Bureau of Land Management Office in Billings, Montana, Dorrough stated:

Since filing the above numbered oil and gas lease application, I have learned that applications for acquired lands should be filed direct to Washington, D. C. Therefore, if any part of this application is considered acquired land, please accept this letter as formal notice that it is my desire that the matter be forwarded to your proper land office in order that an oil and gas lease can be issued.

In replying to this letter on January 25, 1949, the Regional Chief of Adjudication, Region III, informed Dorrough that of the lands included in his application only certain lands in sections 5 and 8 were public domain land. He then said:

In view of the fact that the above land is the only land that may be included in a lease under the leasing act of February 25, 1920, it is suggested that you file a new application covering the balance of the land. Such application should be filed direct in the Bureau of Land Management office in Washington, D. C. Your application should clearly show that it is an application for acquired land.

The information contained in the letter of January 25, 1949, as to the status of the lands was correct as to the parcels in sections 5 and 8, and it was correct with respect to all of the remaining parcels in the application except two of the parcels. The records of the District Land Office and the status sheet prepared in connection with the processing of the application disclosed that two of the parcels, including the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 7, were public domain land or deposits, but through error the letter of January 25, 1949, did not include those parcels in describing the public domain land subject to leasing under the Act of February 25, 1920, as amended. The correct status of these two parcels could have been ascertained by Dorrough by inspecting the records in the District Land Office or the land

records of McKenzie County, North Dakota. Dorough failed to file a new application for the acquired lands included in his original application as suggested in the letter of January 25, 1949. Instead he filed a new public domain application for the lands in sections 5 and 8, and pursuant to Dorough's specific request, the original application as to the balance of the lands was forwarded to Washington, D. C., for processing as an acquired lands application. The application was rejected as to one parcel because it was public domain land and not acquired land, and as to the two parcels in private ownership. Thereafter an acquired lands lease, BLM-A 016898, was issued to Dorough for the other parcels, and because of error the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 7 was included in the lease.

7. Defendant admits the allegations of paragraph 7 of the complaint except defendant alleges that the application of John Snyder was filed on May 14, 1951. Further answering paragraph 7, defendant alleges that Snyder's application was filed under the proper statute and regulations and he was the first qualified applicant to file and to maintain a proper application for a lease of the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 7.

8. Defendant admits the allegations of paragraph 8 of the complaint except defendant alleges that the assignment from Dorough to the plaintiff was approved by the Manager of the Bureau of Land Management Land Office at Billings, Montana, not by defendant's predecessor, on January 21, 1953, effective as of June 1, 1952.

9. Defendant is without information sufficient to form a belief as to the truth of the allegations of paragraph 9 of the complaint.

10. Defendant admits that by letter dated January 22, 1954, to the Director, Bureau of Land Management, John Snyder requested the cancellation of lease BLM-A-016898 as to the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 7, on the ground that the lease of that land had been issued in error since the land was not "acquired"; defendant further admits that on February 16, 1954, defendant's subordinate canceled lease BLM-A 016898 to the extent of the above-described forty acres without prior notice to plaintiff or Dorough. Defendant alleges that plaintiff and Dorough were notified of the decision of cancellation on February 23, 1954,

advised that the action would become final thirty days thereafter and that they had the right of appeal. Defendant denies all other allegations of paragraph 10 of the complaint.

11. Defendant admits the allegations in the first three sentences of paragraph 11 of the complaint and denies all other allegations of that paragraph inconsistent with or contrary to the following allegations. Defendant alleges that the basis for the opinion is found in the entire opinion and not in one isolated sentence, that Dorrough abandoned and withdrew his application for a lease under the Mineral Leasing Act of February 25, 1920, and that the lease to plaintiff's predecessor was issued in error and in violation of preference rights conferred by statute. Defendant alleges that the cancellation of lease BLM-A 016898 as to the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 7 was correct and lawful, was within the authority granted to the Secretary of the Interior, and was not arbitrary or capricious.

12. Defendant is advised and believes that the allegations of paragraph 12 of the complaint are conclusions of law which do not require answer and, therefore, they are neither admitted nor denied.

13. Defendant is advised and believes that the allegations of paragraph 13 are conclusions of law and arguments which do not properly require answer and, therefore, they are neither admitted nor denied.

14. Defendant admits that plaintiff has exhausted its administrative remedy and denies the other allegations of paragraph 14 of the complaint.

15. Defendant denies the allegations of paragraph 15 of the complaint.

Wherefore, defendant demands judgment dismissing the complaint and for costs.

P. W. M., 1/5/55,
PERRY W. MORTON,
Assistant Attorney General,
W. H. W.,
WALTER H. WILLIAMS,
Attorney,
Room 2135, Department of Justice,
Attorneys for defendant.

I hereby certify that on the 12th day of January 1955, a copy of the foregoing answer was mailed to Whiteford, Hart, Carmody & Wilson, 815 15th Street, N. W., Washington, D. C.

Walter H. Williams.

WALTER H. WILLIAMS.

Order granting intervention

(Filed March 8, 1956)

Upon consideration of the Motion of John Snyder to Intervene as a Defendant in the above cause, and it appearing that none of the parties objects, it is ordered, adjudged and decreed, that John Snyder is granted leave to intervene and is made a party defendant in the above cause.

(S) EDWARD A. TAMM,
Judge.

Date: March 8th, 1956.

We do not object:

(S) John J. Wilson,
JOHN J. WILSON,
Attorney for Plaintiff.

(S) Walter H. Williams,
WALTER H. WILLIAMS,
Attorney for Defendant.

Answer of John Snyder, intervenor

Filed March 8, 1956)

Intervenor adopts the Answer of defendant herein, except the Third Defense thereof; and, with respect to the numbered paragraphs of the Fourth Defense thereof, identified below, intervenor makes the following additional allegations:

1. In amplification of the allegations of paragraph 6 of the defendant's answer, answering paragraph 6 of the complaint, intervenor alleges as follows:

From the time of the enactment of the Mineral Leasing Act for Acquired Lands, and at all times pertinent hereto, the Department of Interior has consistently interpreted and administered that Act as conferring upon the Secretary of Interior

an authorization to lease which is separate and distinct from that conferred by the Mineral Leasing Act of 1920. The Department has consistently held that public domain lands can be leased only under the Mineral Leasing Act of 1920, and that acquired lands can be leased only under the Mineral Leasing Act for Acquired Lands. The Department has consistently required that separate applications be made for oil and gas leases with respect to lands subject to lease under one or the other of the two statutes. The Department has consistently held that, where, as was true of the application upon which the lease to plaintiff's assignor was issued, an application for a lease of acquired lands under the Mineral Leasing Act for Acquired Lands, includes public domain lands which are subject to leasing only under the Mineral Leasing Act of 1920, the application must be rejected with respect to the public domain lands improperly included in it. Further, the Department has consistently held that such an application confers no preference right to an oil and gas lease of such lands under the Mineral Leasing Act of 1920; and that if public domain lands are erroneously included in a lease issued under the authority conferred by the Mineral Leasing Act for Acquired Lands, as was true of the 40 acres at issue here, the issuance of the lease is without authority of law with respect to an intervening proper applicant such as the intervenor, and is subject to cancellation.

Duly authorized officials of the Department of Interior have determined, and intervenor alleges, that this consistent administrative decision, practice, and procedure, is required by the Mineral Leasing Act of 1920 and the Mineral Leasing Act for Acquired Lands; that it is necessary to effectuate the purposes of said statutes, and that it is not in any way in conflict therewith. This determination was based in part upon the following reasons.

(a) The Mineral Leasing Act of 1920 and the Mineral Leasing Act for Acquired Lands are by their express terms mutually exclusive; the former applying only to public domain lands, the latter only to acquired lands.

(b) The problems dealt with in the two statutes are materially different. The ownership interest of the United States

in public domain lands is a present undivided interest; while in acquired lands it is frequently only fractional or *in futuro*. Public domain lands are in large part vacant and unappropriated, and are under the jurisdiction of the Department of Interior itself; while acquired lands are subject to a variety of primary uses, to differing statutory conditions and limitations, and to the control of many different agencies of the government. At the time of the passage of the Mineral Leasing Act for Acquired Lands in 1947, the Department of Interior had developed a comprehensive system of records and procedures suitable for leasing public domain lands on a nationwide basis under the Mineral Leasing Act of 1920; but it had no such records or procedures suitable to the leasing of acquired lands, and lacked even the basic information as to the title to such lands, which was available only to the acquiring agency.

(c) The provisions of the two statutes were materially different. The Mineral Leasing Act for Acquired Lands provided that no acquired land could be leased without the prior consent of the acquiring agency, and then only upon such conditions as that agency might prescribe. The two statutes provided for a completely different disposition of income from leases under each statute. There was a limitation as to the total acreage one person could lease under each statute; and leases under one statute were not chargeable to the other. The Mineral Leasing Act for Acquired Lands contained special provisions which were not contained in the Mineral Leasing Act of 1920 concerning leasing of fractional and future interests, and for the collection of title information as to acquired lands from the acquiring agencies.

(d) The information required in an application for an acquired lands lease was materially different from that required in an application for a public lands lease. An acquired lands application must contain a statement of the applicant's interest in other acquired lands; a public lands application must contain this information as to public lands. An acquired lands application must contain special information where the interest is future or fractional, and, where practicable, information

which will enable the Department of Interior to identify the agency involved and locate the records as to title.

(e) Applications for acquired lands leases were filed in Washington; applications for public lands in the appropriate field office.

(f) Different lease forms were provided for acquired lands and public lands, and the contents of the two leases differed materially. Each was made subject to the appropriate, and different, statute and regulations. Each designated the particular, and different, government official empowered to exercise authority with respect to operations under the lease.

(g) It was necessary to, and the Department did, process applications for acquired land leases entirely separately from applications for public domain leases. Public domain applications were filed and largely processed in the field, but acquired lands applications were filed in Washington and entirely processed there. The processing of applications under the two statutes in Washington was handled by separate units within the Department staffed by different personnel. The two types of applications were checked against different records, located in physically separated places, and were subject to distinct docket control systems. Acquired lands applications were subject to processing that was unnecessary with respect to public domain applications. Leases under the two statutes were executed by different officials under distinct delegations of authority. Lease revenues were collected and distributed through distinct fiscal systems. Changes in administrative forms and procedures under each of the statutes were made independently of the other to meet the differing problems presented.

(h) The filing of mixed applications under both statutes for a lease of both public domain and acquired lands would render ineffective the regulatory provisions designed to secure differing information required for the proper administration of the two leasing programs. It would make it difficult if not impossible for the Department of Interior to enforce the applicable acreage limitation. It would make it difficult if not impossible for either the Department or other applicants to determine whether the land involved were open to leasing, and hence would necessarily lead, as it did in the present instance.

to filing of overlapping applications on the same lands, to unsettled lease titles, and to hardship and expense upon the government, the conflicting claimants and the courts. It would prevent the Department from utilizing the separate administrative processes which are essential to the effective administration of the two statutes, and would deny the Department the vital administrative flexibility that arises from the possibility of making independent changes in the separate administrative processes. It would inevitably result, as it did in the present instance, in the issuance of oil and gas leases under the wrong statute. In addition to the inherent lack of authority which would require cancellation of such leases, the issuance of leases under the wrong statute would result in a failure to incorporate in the lease the provisions necessary to protect the government's divergent interests under the two statutes, and make it administratively difficult, if not impossible, to effectuate the statutory requirements designed to protect the primary use for which acquired lands were acquired, and to assure the distribution of lease revenues in accordance with the intent of Congress.

(i) The consistent administrative practice of the Department of Interior requiring separate applications under the two statutes, and denying a preference right to lease lands improperly included in a mixed application, is an application of the more general principle consistently applied by the Department that an applicant who has earned a statutory preference to rights in government-owned lands by an application under the proper statute and regulation, cannot be deprived of that right by a purported grant issued to another in disregard of it.

2. In amplification of the allegations of paragraph 7 of the defendant's answer, answering paragraph 7 of the complaint, intervenor alleges as follows:

On or about May 11, 1951, intervenor examined the appropriate records at the Land Office in Billings, Montana to determine the availability for leasing of the 40 acres of land involved in this proceeding. Those records disclosed that the mineral rights in this land were in the public domain, and subject to lease under the Mineral Leasing Act of 1920. A check of all of the available records disclosed no pending ap-

plication for lease and no lease relating to these lands. Intervenor had no notice, actual or constructive, of the acquired lands application filed by plaintiff's assignor. Record of such acquired lands application was available only in Washington. Intervenor knew, and it was a matter of common knowledge among those engaged in the business of acquiring oil and gas leases, that public domain lands were subject to lease only by application under the Mineral Leasing Act of 1920, and there was no reason to check the records of acquired lands applications in Washington when the land in question was in the public domain. Intervenor filed a proper public domain lands application for lease of the 40 acres in issue in reliance upon the record showing that said lands were available for leasing.

Intervenor's application for a public domain lands lease was not initially rejected as to the 40 acres in question on the ground plaintiff alleges, that said acreage was acquired lands, but rather on the ground that said acreage had been patented by the United States without reservation of oil and gas rights. In any event, intervenor did not acquiesce in this erroneous decision of the Department official as plaintiff's assignor did, but discharged the obligation imposed upon him by the applicable regulations by appealing therefrom. The Department was thus given the opportunity to correct its error, and did so by revoking the earlier decision and properly including said 40 acres in intervenor's valid public domain lands lease.

3. In amplification of the allegations of paragraph 8 of the defendant's answer, answering paragraph 8 of the complaint, intervenor alleges as follows:

Intervenor's valid public lands application for lease of the 40 acres of public lands in issue was filed and of record for over six months before the effective date of the purported acquired lands lease issued to plaintiff's assignor effective December 1, 1951. Intervenor's valid public lands application was of record and within the constructive if not actual notice of plaintiff for over 11 months before the date upon which plaintiff alleges that it took an assignment of said purported lease.

4. In answer to paragraph 9 of the complaint, intervenor alleges as follows:

In addition to the facts alleged in the preceding paragraph, intervenor's valid public lands lease was amended to include the 40 acres in question on April 24, 1953, and was thereafter of record in the appropriate records of the Department of Interior; and on October 13, 1953 intervenor also recorded said lease in the Office of the Register of Deeds, McKenzie County, North Dakota. The Charlson Field, in which the 40 acres in question are located, was discovered by the Amerada Petroleum Corporation, which completed the first well in about August, 1952, over 14 months after intervenor's proper application for lease was filed and recorded with the Department of Interior. The plaintiff did not complete its first well in the Charlson Field until more than a year later—in September 1953—more than two years after intervenor's application was of record, and more than four months after the amendment of intervenor's valid lease to include the 40 acres in question. Intervenor's lease of the 40 acres in question was recorded in the lands records in the county in which said 40 acres are located before a well was drilled closer than approximately one mile from said land. If plaintiff relied upon their purported acquired lands lease to their damage, that reliance, and damage, if any, was wholly unwarranted and resulted from plaintiff's gross carelessness in failing to check the records available to the public generally, including plaintiff.

5. In amplification of the allegations of paragraph 11 of defendant's answer, answering paragraph 11 of the complaint, intervenor alleges as follows:

From the time of the enactment of the Mineral Leasing Act for Acquired Lands and at all times pertinent hereto, when a mixed application was filed, like the application filed by plaintiff's assignor, the Department of Interior has sought to inform the applicant so that he may file a proper application and obtain the preference provided by the appropriate statute. However, as a matter of consistent administrative decision and practice, the Department has held that the obligation to file a proper application in accordance with the applicable statute and regulations rests finally upon the applicant; that the statutory preference cannot be obtained unless applicant complies with the applicable statute and regulations; and that

where personnel of the Department fail to advise an applicant that his application is filed under the wrong statute, or, as in the case of plaintiff's assignor, furnishes the applicant with partially inaccurate information with respect thereto, the failure or inaccuracy of the personnel of the Department cannot create a right in the applicant to the preference to a lease which is available under the proper statute only upon compliance with its terms and the terms of the applicable regulations.

Duly authorized officials of the Department of Interior have determined, and intervenor alleges, that this consistent course of administrative decision and practice is required by the Mineral Leasing Act of 1920 and the Mineral Leasing Act for Acquired Lands, that it is necessary to effectuate the purposes of said statute, and that it is not in any way in conflict therewith. This determination was based in part upon the following reasons:

(a) The reasons alleged in subparagraphs (a) through (i) of paragraph 1 hereof.

(b) The determination referred to is in part an application of the more general long-established rule of the Department of Interior that where an applicant acquiesces in an erroneous rejection of his application by an official of the Department, he loses his rights as against a subsequent applicant. It is the judgment of the Department of Interior, based upon the experience of the Department over the years in administering the laws of the United States relating to the disposition of lands, that this general long-established rule is necessary in the interests of certainty in lease titles, and of according finality to administrative action.

Wherefore, intervenor demands judgment dismissing the complaint and for costs.

JAMES R. BROWNING,
PERLMAN, LYONS & BROWNING,
1021 Tower Building, Washington 5, D. C.,
Attorney for John Snyder.

Stipulation

(Filed May 21, 1956)

It is hereby stipulated by counsel for the parties that the following documents may be received in evidence without further proof, reserving to each party the right to contend that any fact established thereby is irrelevant or immaterial:

1. The Affidavit of Oscar E. Collins, dated February 16, 1956, which is Attachment C to the Motion of John Snyder for summary judgement filed March 8, 1956, is by reference made Exhibit A to this stipulation. Markings of emphases on page 2 of Ex. 2 treated as nonexistent.

2. The certified copy of page 195 from the North Dakota Tract Book, Volume No. 185, in the Bureau of Land Management in Washington, D. C., filed April 17, 1956, and marked Pl. Ex. 1, is by reference made Exhibit B to this stipulation.

3. The certified copy of the page of the Tract Book in the Bureau of Land Management, Land Office, Billings, Montana, pertaining to Section 7, Township 153 North, Range 95 West, 5th P. M. North Dakota, certified by Orval G. Hadley, Manager, on April 19, 1956, and marked Pl. Ex. 2, is by reference made Exhibit C to this stipulation.

4. The copy of an opinion dated August 10, 1954, of Clarence A. Davis, Solicitor, which is attached to the complaint is by reference made Exhibit D to this stipulation.

5. The Affidavit of T. O. H. Mattson, dated April 20, 1956, and filed April 26, 1956, is by reference made Exhibit E to this stipulation.

6. A copy of a notice of appeal dated March 17, 1954, by Thomas G. Dorough and The Texas Company and filed in the Bureau of Land Management on March 22, 1954, is attached hereto as Exhibit F.

7. A copy of the page of the serial register in the Bureau of Land Management, Land Office, Billings, Montana, pertaining to the patent Bismarck 024344 issued to Selmer K. Danielson is attached hereto as Exhibit G.

8. A copy of a memorandum dated January 28, 1954, from Manager, Land Office, Billings, Montana, to Director, Bureau of Land Management, is attached hereto as Exhibit H. 15

9. A copy of a patent dated April 11, 1940, from the United States to Selmer K. Danielson, recorded December 19, 1952, in Deed Book 67, page 45 of McKenzie County, North Dakota, is attached hereto as Exhibit I.

10. A copy of a deed dated January 2, 1942, from Selmer K. Danielson and Helen Danielson, recorded January 22, 1942, in Deed Book 42, page 300, of McKenzie County, North Dakota, is attached hereto as Exhibit J. No stipulation as to time of placing and effect of legend on reverse side of patent: "Return to the Texas Co., Box 1161, Bismarck, N. D."

11. Assignment of lease by Dorough to plaintiff dated April 21, 1952, and filed May 8, 1952, with application of plaintiff for approval; and decision of Land Office, January 21, 1953, approving assignment.

J. J. W.

P. S. P.

W. H. W.

J. R. B.

(S) JOHN J. WILSON,

(S) PHILIP S. PEYSER,

Attorneys for Plaintiff.

(S) WALTER H. WILLIAMS,

Attorney for Defendant, Clarence A. Davis.

(S) JAMES R. BROWNING,

Attorney for Defendant, John Snyder.

STIPULATIONS AND STATEMENTS OF COUNSEL AT THE TRIAL ON JUNE 25, 1956

At the trial on Monday, June 25, 1956, in the District Court, before Honorable Robert N. Wilkin, United States District Judge, sitting by designation, it was stipulated and agreed by counsel for the contesting lessees (namely, plaintiff The Texas Company and intervenor-defendant John Snyder) that in the final judgment of the Court determining which party has the valid lease, the Court may and should order said parties to take all steps necessary to clear the title of the successful lessee to the leasehold, including surrender of the lease of the unsuccessful lessee to the Secretary of the Interior and the correction of the record in McKenzie County, North Dakota, through the

execution of any necessary documents and howsoever; except the stipulation was not to apply in the event that the Court's decision was based upon a finding that the purported cancellation of plaintiff's lease was not effective because of the lack of a judicial proceeding (Tr. 60-62, 73-78).

It was further stipulated and agreed by all the parties that the processing of applications to the Department of Interior for oil and gas leases of acquired lands was suspended by that Department for a substantial part of the period from the passage of the Mineral Leasing Act for Acquired Lands on August 7, 1947, until October 13, 1950 (Tr. 70-71).

DURING DEFENDANT'S OPENING STATEMENT THE FOLLOWING
OCCURRED (TR. 66)

The COURT. The Acts of 1920 and 1947.

Mr. WILLIAMS. Yes. The defendant says that those acts are separate authorities to lease, and that separate leases must be issued under each Act.

At the time that Mr. Dorough filed his application in 1948 he filed a public domain application. The land was in fact public domain that we are dealing with here, but 80 percent of the land that he applied for was acquired land, and at that time applications for acquired land had to be filed in Washington and not in the field.

Mr. Dorough made the first mistake here, I think. He filed an application most of which should not have been filed in the District Land Office, and in his first letter to the District Land Office he said:

Since filing the above application I have learned that applications for acquired land should be filed in Washington.

In other words, he, I think it is quite clear, had not even read the regulations governing the leasing of acquired lands before he filed his application.

He did have a proper application at that time for a public land lease on this 40 acres, but he didn't have a good application for the rest of it.

* * * * *

During the presentation of defendant's case the following occurred (Tr. 68-70)

The COURT. Let me inquire. Could the Land Office have granted a lease on that part of the application which covered public land at that time?

Mr. WILLIAMS. In 1948 the Manager of the District Land Office could have granted a lease on the public land; he could not grant a lease on acquired land. The authority to do that was in Washington. The public land authority as to public land leasing had been delegated to him; yes, sir.

The COURT. He said in his letter, as I remember, there were about 200 acres that were still public domain.

Mr. WILLIAMS. That is correct.

The COURT. And he could have issued a lease for that and excluded the rest on that application, could he?

Mr. WILLIAMS. He could have.

The COURT. That would not have covered the 40 acres.

Mr. WILLIAMS. The Manager could have. He made a mistake here, there is no question about that, but I want to state that the state records on which the Manager relied were equally available to Mr. Dorough. The law says that the records of the District Land Office are public records open to inspection, and Mr. Dorough would have looked at exactly the same records; and the Serial Register in the District Land Office I think was quite sufficient to put anybody on notice that the land was in fact public land.

The COURT. I raised the point only to make sure that I understood your contention. I wondered if you were contending that that application did not warrant the lease at all of any kind.

Mr. WILLIAMS. No, I am not making that contention.

The COURT. I see.

Mr. WILLIAMS. If all information had been correct, what the Manager could have done was to grant a lease on all of the public land in the application; reject the application as to all of the rest of the land.

The COURT. I see.

Mr. WILLIAMS. And as a matter of fact, Mr. Dorough included two tracts of privately owned land in which the United States had no interest whatsoever.

DURING THE PRESENTATION OF THE ARGUMENT FOR THE PLAINTIFF, THE FOLLOWING OCCURRED (TR. 80-82)

Mr. WILSON. * * *

Your Honor, it is not now before us, but there has been in this record a great discussion about mixed applications, partly for acquired lands and partly for public domain lands and what has to be done with a mixed application.

The COURT. In view of Mr. Williams' concession, which you properly said was forthright, I don't think you need to discuss that. That's why I asked the question.

Mr. WILSON. Yes, sir; good.

Mr. BROWNING. There is not perhaps the opportunity but I do not think that would be justified from the defendant-intervenor's point of view. I think it is perfectly clear that separate applications under the two statutes were required and are required.

The COURT. And it would be your contention contrary to the statement of Mr. Williams?

Mr. BROWNING. I do not believe Mr. Williams intended to say to the contrary, sir.

What Mr. Williams was saying, if I understood it—and perhaps I should let him speak for himself——

Mr. WILSON. I will sit down, Your Honor.

Mr. WILLIAMS. I said, and if I didn't I will restate it, that the original application was a good application, as is stated in the Solicitor's opinion, for the public lands included in it.

The COURT. Yes, and a valid lease could have issued.

Mr. WILLIAMS. For the public land only.

The COURT. For the public land.

Mr. WILLIAMS. That is correct, but it was not a good application; it was wholly invalid as to the acquired land.

The COURT. Yes.

Mr. WILLIAMS. If it had been maintained then it would have been a different result, but it was not maintained.

The COURT. I was going on to say to Mr. Wilson that so far as the Secretary of the Interior is concerned you could move to your next point and discuss what is the effect of what happened thereafter.

Mr. WILSON. Thank you.

The COURT. And I am not precluding Mr. Browning. He is entitled to his day in court.

RECEIVED
DISTRICT LAND OFFICE
BISMARCK, N. DAK.

Date APR 19 1949

Hour _____

Department of the Interior
BUREAU OF LAND MANAGEMENT

3578924 Serial No. 025004

954600

APPLICATION FOR LEASE OF LANDS NOT WITHIN THE KNOWN GEOLOGIC STRUCTURE OF A PRODUCING OIL OR GAS FIELD, ACT OF FEBRUARY 25, 1920 (41 STAT 437) AND AS AMENDED BY ACT OF AUGUST 21, 1935 (49 STAT 674) AS AMENDED BY ACT OF AUGUST 8, 1946 (60 STAT 930).

STATE OF North Dakota

County of Burleigh

I, THOMAS G. DOROUGH of Denver, Colorado being of lawful age and first duly sworn on my oath, depose and say that I make the following statements complying with Circular No. 1386, dated May 7, 1936, to apply for lease for production of oil and gas on lands hereinafter described.

(a) My name and address: THOMAS G. DOROUGH, 424 Cont'l Oil Bg., Denver, Colo

(b) I am a native born (male) citizen of the United States (or if naturalized, give date of naturalization and name of court and number of case.) I am over the age of twenty-one years and am married. My husband is (single)

a native born citizen of the U. S. A., and his name is: _____

(c) My other interests, direct and indirect, in permits and leases and applications therefor, in the same state, with identification of records wherein such interests may be found, are as follows:

(d) Description of lands for which lease is desired, being in as nearly compact form as possible and involving only one geologic structure, are as follows:

Township 153 North, Range 95 West

Sec. 4: E1/4, SW1/4, SE1/4, S1/2SW1/4 (includes Lot 1) LT1 (vacant)
Sec. 5: E1/4, NW1/4, SE1/4, S1/2SW1/4 (includes Lots 2 & 3) Subst. S1/2SW1/4
Sec. 7: E1/4, NW1/4, SE1/4, S1/2SW1/4 (includes Lot 4) Subst. S1/2SW1/4
Sec. 8: E1/4, NW1/4, SE1/4, S1/2SW1/4 (includes Lot 4) Subst. S1/2SW1/4
Sec. 9: N1/4, NE1/4, NW1/4, SE1/4 Subst. S1/2SW1/4
Sec. 15: NW1/4, NE1/4, NW1/4, SE1/4 Subst. S1/2SW1/4
Sec. 17: S1/4, NW1/4, NE1/4, SE1/4 Subst. S1/2SW1/4
Sec. 18: N1/4, NE1/4, NW1/4, SE1/4 (includes Lots 1, 2, & 3) Subst. S1/2SW1/4
Sec. 19: N1/4, NE1/4, NW1/4, SE1/4 Subst. S1/2SW1/4

located in McKenzie County, North Dakota, embracing 2.080 acres, more or less.

(e) To the best of my knowledge and belief, the lands applied for are not within the known geologic structure of any producing oil or gas field and are believed to contain oil and gas.

(f) I give the following references as to reputation and business standing:

W. J. RADIGAN of Denver, Colorado
H. P. MACAULEY of Denver, Colorado
EARL LYLE of Casper, Wyoming

(g) Payment of filing fee and at least one-half of the first year's rental for the above described land is made herewith. The applicant is ready upon demand to pay the remainder of the rental and to furnish such bond or bonds as may be required under the lease or regulations.

Subscribed in my presence and sworn to before me this 19th day of April, 1949.

My commission expires: _____

Notary Public.

FORM NO. 14-15

FOR SALE BY KINTREL BLUE PRINT CO., CASPER

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4-001a

(45)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

FILL OUT THIS BLANK WITH INK

Status Clerk:

Please furnish status appearing on the Tract Books affecting

Oct 2 Lease Appl. Entry No. *025004*
 Claimant's name *Thomas G. Darrough*
 Description *see appl.*

Sec. _____ Tp. _____ R. _____ Meridian *5th PM*
 State *North Dakota* District *B.L.M.*
 T. B. Vol. *185* . p. *199*
Oct 19 . 19*48* Div. _____
(Date of request) (Full name of clerk)

Does posting and survey agree with above description *Yes.*
 Conflicts *id 021825 Williston (no 006 usin) as to SNE,*
WSE, SSW Sec 4; id 3088 Will. (no 006 usin) as to
ESE Sec 4, ENE Sec 7; id 157 Will. (no 006 usin) as to
Lot 4, SSW Sec 7, Lot 18 NNE Sec 18; id 01762 Will. (see over)
 Rights-of-way *none*

Withdrawals *Withdrawal Ex Order #7674 of July 9, 1937 for use*
by Dept of Agric. in connec. with Little Missouri
Project LA ND 1 - A 8/11/37 - 1686036

Information desired

Sec 4 Lot 1 3967
Sec 5 Lot 2 3950
3 3950
Sec 7 Lot 4 3909
Sec 18 Lot 1 3911
2 3911
3 3911

Date furnished *Oct 2* . 19*48* *T.R. Agrell*
(Full name of clerk)

This slip will be filed with case to which it pertains, and the status clerk, who must sign same, will be held responsible for its correctness.

(over)

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Conflicts (Cont)

- (no O&G in) as to ~~lots~~ Lots 2, 3, SNE, SE NW Sec 5⁼⁼
 Hd 022726 Will (no O&G in) as to NE SE Sec 7 NW SW Sec 8⁼⁼
 *Hd 024344 Bio (O&G used Oct 7/17/14) as to NE SW Sec. 7⁼⁼
 Hd 018584 Will (no O&G in) as to NW NE Sec. 15⁼⁼
 Hd 03112 Will. (no O&G in) as to NW Sec 15⁼⁼
 Hd 105 Will (no O&G in) as to SNE, NSE Sec 17⁼⁼
 Hd 015456 Will (no O&G in) as to NNE Sec 14, WSE Sec 18⁼⁼
 Hd 016404 Will (no O&G in) as to Lots 2, 3, NE SW, SE NW Sec 18⁼⁼
 Hd 016443 Will (no O&G in) as to NE Sec 18⁼⁼

6-001a
(May 1949)

DEPARTMENT OF INTERIOR
BUREAU OF LAND MANAGEMENT

FILL OUT THIS BLANK WITH INK

Status Clerk:

Please furnish status appearing on the Tract Books affecting

08-G

Entry No. A-016898

Claimant's name

Thos. G. Dorrough

Description

Sec. _____ Tp. _____ R. _____ Meridian _____

State No. Dak. District _____

T. B. Vol. 185, p. _____

(Date of request)

19

(Full name of clerk)

Div. _____

Does posting and survey agree with above description _____

Conflicts _____

Rights-of-way _____

Withdrawals _____

Information desired _____

All lands in this apply are patented
without 08 G resins except lot 1 Sec. 4, SWSE,
SWSW Sec. 5, SESW, NW NW, NW NE Sec. 8, which
are vacant public lands

Date furnished 5/20, 19 49

TRC

(Full name of clerk)

This slip will be filed with case to which it pertains, and the status clerk,
who must sign same, will be held responsible for its correctness.

11991

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39a

THOMAS G. DOROUGH

OIL LEASES—ROYALTIES

424 CONTINENTAL OIL BUILDING,
DENVER 2, COLORADO,
January 19, 1949.

Re: Bismarck Serial #025004

UNITED STATES DEPARTMENT OF INTERIOR,
Bureau of Land Management,
326 Stapleton Building, Billings, Montana.

DEAR SIRs: To date I have received no word from the United States Department of Interior, Bureau of Land Management, pertaining to my oil and gas lease application, Bismarck Serial #025004. It is my understanding that Federal Government lands in North Dakota are now being handled by your office.

Since filing the above numbered oil and gas lease application, I have learned that applications for acquired lands should be filed direct to Washington, D. C. Therefore, if any part of this application is considered acquired land, please accept this letter as formal notice that it is my desire that the matter be forwarded to your proper land office in order that an oil and gas lease can be issued.

Very truly yours,

THOMAS G. DOROUGH.

TGD:es.

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT

Region III, Bismarck 025004

326 STAPLETON BUILDING, BILLINGS, MONTANA,

January 25, 1949.

Mr. THOMAS G. DOROUGH,
424 Continental Oil Building,
Denver 2, Colorado.

DEAR MR. DOROUGH: Reference is made to your letter of January 19 concerning the above oil and gas lease application.

The only public domain land included in your application is described as:

T. 153 N. R. 95 W.

sec. 5, SW $\frac{1}{4}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$.

sec. 8, NW $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$.

In view of the fact that the above land is the only land that may be included in a lease under the leasing act of February 25, 1920, it is suggested that you file a new application covering the balance of the land. Such application should be filed direct in the Bureau of Land Management office in Washington, D. C. Your application should clearly show that it is an application for acquired land.

Action will be taken on your application as to the above described land when we receive certain information from the Soil Conservation Service of the Department of Agriculture.

Very truly yours,

W. H. BURNETT,
Regional Chief of Adjudication.

WHB:B.

THOMAS G. DOROUGH
OIL LEASES-ROYALTIES
424 CONTINENTAL OIL BUILDING,
DENVER 2, COLORADO,
February 3, 1949.

Re: Bismarck #025004

UNITED STATES DEPARTMENT OF INTERIOR,
Bureau of Land Management,
326 Stapleton Building, Billings, Montana.

(Attention: Mr. W. H. Burnett.)

GENTLEMEN: I am in receipt of your letter of January 25, 1949, regarding the above mentioned oil and gas lease application on Government lands. In view of the fact that only 200 acres of the lands desired proved to have the status of vacant, public lands, it is my desire that the entire application be forwarded to the Bureau of Land Management, Washington D. C., with a request that it be treated as an application for an oil and gas lease on acquired lands, thus retaining its filing time and date priority.

Enclosed herewith please find a separate application on the following described lands, in connection with other lands.

Township 153 North, Range 95 West:

Section 5: SW $\frac{1}{4}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$

Section 8: NW $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$

Section 4: Lot 1 (NENE)

Very truly yours,

Thomas G. Dorough
THOMAS G. DOROUGH,
424 Cont'l Oil Bldg., Denver, Colo.

As custodian of the records of the Bureau of Land Management, Land Office, Billings, Montana, I hereby certify the above to be a true copy of letter dated February 3, 1949, from Thomas G. Dorough to the U. S. Department of Interior, relative to oil and gas lease application Bismarck 025004.

FOR THE MANAGER, LAND OFFICE,
S. BRUCE SCHUYLER,
Administrative Assistant.

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

Bismarck 024999 O & G, 025002, 025004

Region III

326 Stapleton Building,
BILLINGS, MONTANA,
February 4, 1949.

MEMORANDUM

To: Director.

From: Regional Chief of Adjudication.

Subject: Transmitting oil and gas case files.

I transmit herewith the following listed case files:

Bismarck 024999 Thomas G. Dorough.

Bismarck 025002 Thomas G. Dorough.

Bismarck 025004 Thomas G. Dorough.

Each of these case files has attached to it a letter from Mr. Dorough showing that he wants the application to be considered as for acquired land only.

With the same mail this office received supplemental applications by Mr. Dorough under 025000 and 025003, including in those applications the public domain land that was included in 024999, 025002 and 025004.

Accordingly, it is suggested you delete from 024999 the NW $\frac{1}{4}$ sec. 3, T. 153 N. R. 95 W., and from 025002 the SW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 15, T. 151 N. R. 95 W., and from 025004 the SW $\frac{1}{4}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 5, NW $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 8, T. 153 N. R. 95 W. 5th P. M. and that the applications be considered as to the balance of the land as being for acquired land.

We have closed the cases as to these three serials.

(S.) W. H. BURNETT,
Regional Chief of Adjudication.

Standard Form No. 7000 Form approved by Comptroller General U. S. September 26, 1927	MEMORANDUM PUBLIC VOUCHER FOR REFUNDS	Serial No. <u> </u> D. O. Voucher No. <u>BL-2710</u>
U. S. Department of the Interior, Bureau of Land Management 1245 North 29th Street, Billings, Montana		
Location: <u>September 25, 1950</u> <u>Unearned proceeds, lands, etc</u>		
Appropriation or Fund: <u>1428800 Bureau of Land Management</u>		
To Address	Thomas G. Dorrough 424 Continental Oil Building Denver, Colorado	PAID BY FOR USE OF PAYING OFFICE
Deposit received from the above named depositor on <u>April 19,</u> 19 <u>48</u> for <u>oil and gas lease application Bismark 025004 McKenzie County</u> has been applied as herein stated and the balance indicated is returned herewith:		
Amount of deposit <u>Receipt No. 3378924</u> \$ <u>546.00</u> Applied as explained in "Remarks" below		
Balance authorized to be refunded \$ <u>546.00</u>		
Remarks: Application rejected. Approved for payment:		
<u>H.H. Burnett</u> Regional Chief of Adjudication		
Date <u> </u> 19 <u> </u> (Memorandum— Do not sign)		
Title		
Refund by	Check No. <u> </u> dated <u> </u> for \$ <u> </u> Cash, \$ <u> </u> on <u> </u> (Signature of payee) Other method, \$ <u> </u> (Name of payee) (Describe)	on Treasurer of the U. S. in favor of payee named above.

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UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT

WASHINGTON 25, D. C., October 29, 1951.

DECISION

*Rental required application rejected in part, lease forms
transmitted*

Acreage, 1669.94.

Total rental, \$835.

Filing fee, \$22.

Previously paid, \$546.

Balance now due, \$311.

Thomas G. Dorough.

Acquired Land—Oil and gas.

Reference is made to the oil and gas lease application identified above.

The application is rejected as to lot 1 sec. 4, the tract being public domain land and not acquired land. The NE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 7, NW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 6, the privately-owned and the Government has not reacquired the land. Therefore, the application is accordingly rejected as to such tracts. The application is also rejected as to the SW $\frac{1}{4}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 5, NW $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 8, embraced in the applicant's oil and gas lease, Bismarck C25003, under the act of February 25, 1920 (41 Stat. 437).

As to the 1669.94 acres remaining in the application, there are no conflicting claims or interests of record. Examination of the record shows that the applicant is qualified to receive a lease. He is allowed 30 days from receipt of notice hereof within which to execute the attached lease forms in accordance with the accompanying instructions and to pay the rental in the amount indicated above. Failure to comply within the

time allowed will result in the final rejection of the application as to the remaining lands without further notice.

The right of appeal is allowed.

For the Director:

L. E. HOFFMAN,
Chief, Branch of Minerals,
Division of Adjudication.

Attachments.

EJConover:hir.

10/9/51.

Copy to: G. S. 3.

Form 4-1097

(Jan. 1948)

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT

Acquired Lands

Serial BLM-A-016898 (North Dakota)

LEASE OF OIL AND GAS LANDS UNDER THE ACT OF AUGUST 7, 1947

(61 STAT. 913)

This indenture of lease, entered into, in triplicate, and to take effect as of December 1, 1951, by and between the United States of America, through the Bureau of Land Management, hereinafter called the lessor, and Thomas G. Dorough, 424 Continental Oil Building, Denver, Colorado, party of the second part, hereinafter called the lessee, under, pursuant, and subject to the terms and provisions of the act of August 7, 1947 (61 Stat. 913), hereinafter referred to as the act, and to all reasonable regulations thereunder which are now or hereafter shall be in force, which are made a part hereof.

Witnesseth:

SECTION 1. *Rights of lessee.*—That the lessor, in consideration of rents and royalties to be paid, and the conditions and covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and gas deposits owned by the lessor except helium gas in or under the following-described tracts of land situated in

Description

T. 153 N., R. 95 W., 5th P. M., North Dakota

All

sec. 4, S $\frac{1}{2}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$;
 sec. 5, lots 2, 3, SE $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$;
 sec. 7, lot 4, E $\frac{1}{2}$ SW $\frac{1}{4}$;
 sec. 9, NE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$;
 sec. 15, NW $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$;
 sec. 17, S $\frac{1}{2}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$;
 sec. 18, lots 1, 2, 3, E $\frac{1}{2}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$,
 W $\frac{1}{2}$ SE $\frac{1}{4}$;
 sec. 19, N $\frac{1}{2}$ NE $\frac{1}{4}$.

containing 1669.94 acres, more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph or telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment thereof, for a period of 5 years, and so long thereafter as oil or gas is produced in paying quantities; subject to any unit agreement heretofore or hereafter approved by the Secretary of the Interior, the provisions of said agreement to govern the lands subject thereto where inconsistencies with the terms of this lease occur.

* * * * *

In witness whereof:

THE UNITED STATES OF AMERICA,
 FOR THE DIRECTOR,
 BUREAU OF LAND MANAGEMENT,
 L. E. HOFFMAN,
Chief, Division of Minerals.
 THOMAS G. DOROUGH,

Lessee.

H. P. MACAULEY,
Denver, Colo.
 R. C. JOHNSON.
Denver, Colo.

Witnesses to signature of lessee.

*If the interest of the United States in the oil and gas proves to be larger or smaller than the interest stated, the rentals and royalties payable by the lessee shall be increased or decreased proportionately.

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT

Region III

1245 NORTH 29th STREET

BILLINGS, MONTANA,

April 23, 1952.

MEMORANDUM

To: Chief, Branch of Minerals.

From: Regional Chief of Administration, Region III.

Subject: Accounting advice 589, acquired lands BLM-A 016898.

Reference is made to accounting advice 589, BLM-A 016898 North Dakota, Thomas G. Dorough, instructing that \$546.00 previously paid be applied.

After an exhaustive search, it was found that on the abstract of moneys received at Bismarck, North Dakota, which list was decentralized as the unearned account, appeared the item: "\$546.00 received April 19, 1948, receipt number 3578924, serial number 025004, Thomas G. Dorough, for oil and gas lease application", with the notation "refunded September, 1950".

In checking with the Land Office on serial BLM 025004, it was found that the case which was cross-referenced with BLM-A 016898 was closed and advance rental payment refunded by the Division of Adjudication. For your information, attached is copy of letter stating that the case was closed, together with copy of the refund voucher.

The item of \$311.00 mentioned on the accounting advice remains in the unearned account of the North Dakota acquired lands. Please instruct us further concerning this accounting advice inasmuch as the \$546.00 referred to has been refunded.

PAUL W. HOWARD,

Paul W. Howard,

Regional Chief of Administration.

Attachments (2).

cc: Chief of Accounts.

SEPTEMBER 23, 1952.

DECISION

Acquired Lands—Oil and Gas.

Additional payment required

Thomas G. Dorough.

Reference is made to oil and gas lease, BLM-A 016898, issued to Thomas G. Dorough, effective December 1, 1951, for 1669.94 acres of acquired lands in T. 153 N., R. 95 W., 5th P. M., North Dakota.

A check of our records discloses that the sum of \$546 paid in connection with oil and gas lease application, Bismarck 025004 on April 19, 1948, was refunded the applicant in September 1950, at the time the application under serial number 025004 was closed out on the records of the local land office and transferred to this office where it was assigned new serial number BLM-A 016898. Therefore, our decision of October 29, 1951, in BLM-A 016898 was in error in so far as it stated that the sum of \$546 had been previously paid and that the balance of \$311 was now due in payment of the first year's rental in connection with the lease offer. In response to decision of October 29, 1951, applicant returned the executed lease forms, together with Check No. 1893, dated November 1, 1951, in the sum of \$311. However, in view of the foregoing the amount of \$546 is still outstanding and unpaid in this case.

Accordingly, the lessee is allowed 30 days from notice hereof within which to forward \$546 in full payment of the first year's rental in connection with the above-described lease. Failure to do so will result in the cancellation of the lease without further notice. The right of appeal is allowed in accordance with the regulations set forth in attached Circular No. 1818.

For the Director:

L. E. HOFFMAN,
Chief, Division of Minerals.

Attachment.

Copy to RA Reg. III.

Form No. 4-1156
This form must not be filed after August 31, 1952

(12) 5-15 Printed and sold by Trust Printing Co., Billings, Montana-6775

ORIGINAL

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

Office Serial No. **BLM**

Contract No. **49L11**
023993

OFFER TO LEASE AND LEASE FOR OIL AND GAS
(Sec. 17 Noncompetitive 5-Year Public Domain Lease)

THIS OFFER WILL BE REJECTED AND RETURNED TO THE OFFEROR AND WILL AFFORD THE OFFEROR NO PRIORITY IF IT IS NOT PROPERLY FILLED IN AND EXECUTED OR IF IT IS NOT ACCOMPANIED BY THE REQUIRED DOCUMENTS OR PAYMENTS. SEE ITEM 3 OF GENERAL INSTRUCTIONS.
(Fill in on a typewriter or print plainly in ink and sign in ink)

1. Name John Snyder

P. O. Address P. O. Box 258, Billings, Montana

hereby offers to lease all or any of the lands described in item 2 that are available for lease, pursuant and subject to the terms and provisions of the act of February 25, 1920 (41 Stat. 437, 30 U. S. C. sec. 181), as amended, hereinafter referred to as the act, and to all reasonable regulations of the Secretary of the Interior now or hereafter in force, when not inconsistent with any express and specific provisions herein, which are made a part hereof.

2. Land requested Mr. Snyder

5th Principal Meridian North Dakota (State)

T. 153 N. R. 95. W. Sec. 4 Legal subdivisions

Lot 1;
Sec. 5: SW $\frac{1}{4}$ SE $\frac{1}{4}$;
Sec. 7: NE $\frac{1}{4}$ SW $\frac{1}{4}$;
Sec. 8: NW $\frac{1}{4}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$.

Total Area 239.67 Acres

3. Land included in lease
(Not to be filled in by Offeror)

5th Principal Meridian North Dakota (State)

T. ~~153 N. R. 95. W. Sec. 4~~ Legal subdivisions

~~XXXXXX~~

Total Area ~~XXXXXX~~ Acres

Rental retained \$ ~~XXXXXX~~

4. Amount submitted: Filing fee \$10, Rental \$ 120.00, Total \$ 130.00

5. Undersigned certifies as follows:

(a) Offeror is a citizen of the United States. Native born Yes Naturalized NE is citizen If naturalized, give court, date and number of naturalization certificate. Corporation or other legal entity (specify what kind):

(b) Offeror's other interests direct and indirect in oil and gas leases and applications or offers therefor in the same State do not exceed 15,000 chargeable acres. (c) Offeror accepts as a part of this lease, to the extent applicable, the Reclamation and Forest stipulations provided for in 43 CFR 151.6. (d) Offeror is 21 years of age or over (or if a corporation or other legal entity, is duly qualified as shown by statements made or referred to herein). (e) Offeror has described all surveyed lands by legal subdivisions and unsurveyed lands by metes and bounds, and further states that there are no settlers on unsurveyed lands described herein.

6. Offeror's signature to this offer shall also constitute offeror's signature to, and acceptance of, this lease and any amendment thereto that may cover any land described in this offer open to lease application at the time the offer was filed but omitted from this lease for any reason, or signature to, or acceptance of, any separate lease for such land. The offeror further agrees that (a) this offer cannot be withdrawn, either in whole or in part, unless the withdrawal is received by the land office before this lease, an amendment to this lease, or a separate lease, whichever covers the land described in the withdrawal, has been signed in behalf of the United States, and (b) this offer and lease shall apply only to lands not within a known geologic structure of a producing oil or gas field at the time the offer is filed.

7. It is hereby certified that the statements made herein are true, complete and correct to the best of offeror's knowledge and belief, and are made in good faith.

"This form is submitted in lieu of official Form 4-1156 and contains all of the provisions thereof as of the date of filing of this offer".

IN WITNESS WHEREOF, Offeror has duly executed this instrument this 11th day of May 19 51.

Witness

Patrick J. McLaughlin
Billings, Montana
Wm. Beila Williams
Billings, Montana

John Snyder
(Lessee signature)

(Attorney-in-fact)

A lease for the lands described in item 3 above is hereby issued, subject to the provisions of the offer and on the reverse side hereof.

THE UNITED STATES OF AMERICA
By William Riddell
(Signing officer)

NOV 1 1952

Montana Land Office
(This)
Nov 2 1952

Effective date of lease Nov 2 1952

U. S. C. sec. 181 makes it a crime for any person knowingly and willfully to make to any Department or agency of the United States any false, fictitious or fraudulent statements or representations as to any matter within its jurisdiction.

BEST COPY AVAILABLE

from the original bound volume

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

OCTOBER 23, 1952.

Serial No. BLM (ND) 023993

Type of case: O & G

Mr. JOHN SNYDER,

P. O. Box 258, Billings, Montana.

Address reply to: Manager, Land Office, 1245 North 29th Street, Billings, Montana.

MY DEAR MR. SNYDER: The application identified above is hereby rejected to the extent and for the reasons indicated below:

Rejected in part for the following reasons:

The NE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 7, N $\frac{1}{2}$ SE $\frac{1}{4}$ Section 8 were patented without oil and gas reservation to the United States under serial numbers Bismarck 024344 and Williston 021093. The name of the present owners of the oil and gas rights may be found in the county records.

The SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 5, NW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 8 conflicts with prior oil and gas lease Bismarck 025003 issued as of April 1, 1949.

The action indicated above will become final 30 days from receipt of notice hereof *without further notice* in the absence of appeal filed in this office or for failure to meet any requirements made above.

_____,
Manager.

Registered mail.
Return receipt.

NOVEMBER 3, 1952.

Mr. WILLIAM RIDDELL, *Manager,*
United States Land Office,
Department of Interior, Bureau of Land
Management,
1245 North 29th Street, Billings, Montana.

APPEAL FROM DECISION OF MANAGER REJECTING A PART OF OIL
AND GAS LEASE APPLICATION SERIAL BLM (ND) 023993

Now comes John Snyder, applicant for lease in the above identified case, and respectfully appeals to the director of the Bureau of Land Management the decision dated October 23, 1952 insofar as such decision rejects applicant's application for oil and gas lease on the NE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 7, Twp. 153N, Rge. 95W, Fifth Principal Meridian, McKenzie County, North Dakota.

The rejection by the manager of said 40-acre tract was erroneous because said land was patented of Serial No. Bismarck 024344, wherein patentee filed a waiver of all oil and gas unto the United States of America under the Act of 7/17/14.

This tract of land was entered upon in 1934 and, therefore, patentee has no preference right to oil and gas lease.

Wherefore, your applicant respectfully requests that said decision of the manager be set aside and that BLM (ND) 023993 be corrected so as to include the NE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 7, Twp. 153N, Rge. 95W, Fifth Principal Meridian, North Dakota.

John Snyder.
JOHN SNYDER.

LAND OFFICE

1245 NORTH 29TH STREET, BILLINGS, MONTANA

BLM (ND) 023993

MARCH 18, 1953.

DECISION

Decision of rejection revoked, appeal denied

Offeror: John Snyder.

Oil and Gas.

Decision of Rejection dated October 23, 1952, rejecting certain lands requested in the above-identified oil and gas lease offer is hereby revoked in its entirety.

The lease offer is rejected insofar as SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 5 and NW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 8 are concerned for conflict with prior oil and gas lease Bismarck 025003 issued as of April 1, 1949.

Inasmuch as the appeal involved only the NE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 7, and inasmuch as these lands have been found to be patented under the Act of July 17, 1914, and subject to lease under the Act of February 25, 1920, as amended, the appeal is denied. These lands will be added to oil and gas lease BLM (ND) 023993 by amendment.

The lease offer is further rejected for filing of a \$1,000 bond for protection of the surface claimants. A form of bond is attached.

Upon failure to furnish the required bond within thirty days from receipt hereof, this decision will become final and the case will be closed without further notice from this office.

_____,
Manager.

Attachment.

Registered mail.

Return receipt.

FHStensland:sh.

Form 4-1163
(Jan. 1951)

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Amendment to oil and gas lease

Billings, Montana (Office); BLM (ND) 023993 (Serial); November 1, 1952 (Date lease issued); I (Amendment number).

JOHN SNYDER,
P. O. Box 258, Billings, Montana.

Pursuant to the provisions of 43 CFR 192.42 (j), this amendment to the above-identified noncompetitive oil and gas lease is issued to John Snyder for the following-described lands, included in item 2 of the "Offer to Lease" under the above serial: 5th Principal Meridian North Dakota, T. 153 N., R. 95 W., Section 7—NE $\frac{1}{4}$ SW $\frac{1}{4}$ containing 40 acres, more or less. Rental retained \$20.00.

These lands, open to oil and gas filing when the "Offer to Lease" was filed but for valid reasons not included in item 3 of the above-identified lease (or prior amendments thereto) having become available for leasing and no withdrawal of the offer to lease or of an election to receive a separate lease in lieu of an amendment to the original lease for these lands having been received, the terms, conditions and provisions of the above-identified lease apply to the land hereinbefore described as if such land had been included in item 3 of the original lease as of the date of its issuance:

In witness whereof, this amendment to the above-identified oil and gas lease is executed and made a part thereof.

THE UNITED STATES OF AMERICA,
By WILLIAM RIDDELL, 4-24-52,
Manager, Land Office.

BILLINGS, MONTANA, P. O. Box 258,

January 22, 1954.

DIRECTOR OF BUREAU OF LAND MANAGEMENT,
United States Department of the Interior,
Washington 25, D. C.

Re: BLM (ND) 023993, Oil and Gas Lease covering NE $\frac{1}{4}$ -SW $\frac{1}{4}$ of Sec. 7, Twp. 153N, Rge. 95W, McKenzie County, North Dakota

DEAR SIR: On May 11, 1951, under the Act of February 25, 1940, (41 Stat. 437, 30 U. S. C. Sec. 181) I filed for lands covering the above description. On November 1, 1952, I was issued an Oil and Gas Lease pursuant to the Mineral Leasing Act above stated for this land. This lease was executed in the Montana District Land Office in Billings, Montana.

On December 1, 1951, Thomas G. Dorough was issued a BLM-A Lease No. 016898, said lease being pursuant to the Act of August 7, 1947 (61 Stat. 913). The records show that this BLM-A Lease has been issued in error insofar as above described land is concerned, and in order to clear up any discrepancy in the title to my lease, I request that you cancel lease BLM-A 016898 as it effects the above described land.

The reason that the Lease BLM-A No. 016898 should not have included the above described land is that the oil and gas rights in and under said land were reserved to the United States in the Patent under the Act of 7-17-14 and therefore the oil and gas rights thereunder are public domain and not "acquired".

Yours very truly,

John Snyder.
JOHN SNYDER.

JS:cl.

cc: Mr. Orval G. Hadley, Mgr., Land Office, Billings, Montana.

BLM-A 016898 ML:RWR

BLM 023993 (North Dakota)

FEBRUARY 16, 1954.

DECISION

*Oil and gas lease for acquired lands BLM-A 016898 canceled
in part*

Thomas G. Dorough.

Acquired Lands—Oil and Gas.

Oil and gas lease for acquired lands BLM-A 016898 issued as of December 1, 1951, to Thomas G. Dorough for among other lands the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 7, T. 153 N., R. 95 W., 5th P. M., North Dakota.

The records show that the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 7, is embraced in homestead entry Bismarck 024344 which has been patented to Selmer K. Danielson. Patent issued on April 11, 1940, with oil and gas reserved to the United States under the act of July 17, 1914 (38 Stat. 509). Accordingly, the oil and gas are in the public domain and not subject to leasing under the act of August 7, 1947 (61 Stat. 913). The land is embraced in oil and gas lease BLM 023993 of John Snyder which issued as of November 1, 1952, pursuant to his application for a lease filed under the act of February 25, 1920 (41 Stat. 437) as amended.

The NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 7, T. 153 N., R. 95 W., 5th P. M., North Dakota, was erroneously included in oil and gas lease BLM-A 016898 and the lease is hereby canceled to that extent. This action will become final thirty days from receipt of notice hereof. The right of appeal is allowed.

The acreage of the lease is reduced to 1629.94 acres. A refund of \$20 rental will be made by Treasury check.

L. E. HOFFMAN,

Chief, Division of Minerals.

RWRoss:jah 2/12/54.

Copy to: FS 3, GS 3, RA Reg. III, L. O. Billings, Div. of Min.,
L. E. Hoffman.

BLM (ND) 023993
BLM-A (ND) 016898

LAND OFFICE

1245 NORTH 29TH STREET
BILLINGS, MONTANA,
January 28, 1954.

MEMORANDUM

To: Director, Bureau of Land Management. Hayden 1-28-54.
From: Manager, Land Office, Billings, Montana.
Subject: Oil and Gas Leases BLM (ND) 023993 and BLM-A
(ND) 016898. Chadsey 1-28-54.
(Attn: 960.)

Reference is made to letter of John Snyder dated January 22, 1954, "Re: BLM (ND) 023993 Oil and Gas Lease covering NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, Township 153 N., Range 95 W., McKenzie County, North Dakota" addressed to the Director of Bureau of Land Management, United States Department of the Interior, Washington 25, D. C., with a copy to this office.

The records in this office have been examined and they seem to substantiate the statement of Mr. John Snyder in the above letter.

Mr. Thomas G. Dorough executed an application for lease under date of April 19, 1948, which was filed in the District Land Office, Bismarck, North Dakota, on April 19, 1948, on the above described land. A lease was issued on Form 4-1097 under date of December 1, 1951. He has assigned this land to the Texas Company.

Mr. John Snyder executed an offer to lease under the date of May 11, 1951, which was filed in the Washington, D. C. Office on May 14, 1951, on the above described land. A lease was issued on Form No. 4-1158 under date of November 1, 1952. He has executed a drilling bond in the amount of \$5000 under date of January 25, 1954, received and filed in this office under the date of January 26, 1954.

It will be noted that the above described land is embraced in the two leases as follows:

Lease BLM-A (ND) 016898, Mr. Dorough as original lessee.

Lease BLM (ND) 023993, Mr. Snyder, lessee.

Inasmuch as Mr. Dorough appears to be the first applicant, and his lease was issued by the Washington, D. C. Office under the Act of August 7, 1947 (61 Stat. 913), both cases are forwarded herewith for the proper action.

Due to the fact that Mr. Snyder is ready to start drilling on this land, an early reply as to the proper disposition of the land in question will be appreciated.

(S) Orval G. Hadley,
ORVAL G. HADLEY,
Manager.

Attachments.

PGHayden:clb.

1-28-54.

Document No. 142937

BOOK

67 485

4-1004-R

The United States of America,

To all to whom these presents shall come, Greeting:

WHEREAS, a Certificate of the Register of the Land Office at Bismarck, North Dakota, has been deposited in the General Land Office, whereby it appears that, pursuant to the Act of Congress of May 20, 1902, "To secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of **Salmer K. Danielson** has been established and duly commuted, in conformity to law, for the northeast quarter of the southwest quarter of Section seven in Township one hundred fifty-three north of Range ninety-five west of the Fifth Principal Meridian, North Dakota, containing forty acres,

according to the Official Plat of the Survey of the said Land, returned to the GENERAL LAND OFFICE by the Surveyor-General:

NOW KNOW YE, That there is, therefore, granted by the UNITED STATES unto the said claimant the tract of Land above described; TO HAVE AND TO HOLD the said tract of Land, with the appurtenances thereof, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way therein for ditches or canals constructed by the authority of the United States; reserving, also, to the United States all coal in the land so granted, and to it, or persons authorized by it, the right to prospect for, mine and remove such deposits from the same upon compliance with the conditions and subject to the limitations of the Act of June 22, 1910 (36 Stat., 583). Excepting and reserving, also, to the United States all the oil and gas in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine and remove such deposits from the same upon compliance with the conditions and subject to the provisions and limitations of the Act of July 17, 1914 (38 Stat., 509).

IN TESTIMONY WHEREOF, I, **Franklin D. Roosevelt,**

President of the United States of America, have caused these letters to be made

Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the **ELVENTH**

day of **APRIL** in the year of our Lord one thousand

nine hundred and **FORTY** and of the Independence of the

United States the one hundred and **SIXTY-FOURTH**

By the President:

Franklin D. Roosevelt
James H. McLaughlin
E. Charles Whyte
 Secretary
 Register of the General Land Office

1107828

RECORD OF PATENTS: Patent Number

UNITED STATES DEPARTMENT OF THE INTERIOR BUREAU OF LAND MANAGEMENT

WASHINGTON 25. D. C. NOV. 4. 1952

I hereby certify that this photograph is a true copy of the patent record, which is in my custody in this office.

Oscar E. Collins
 Chief, Copy Records Section

BEST COPY AVAILABLE
 from the original bound volume

Document No. 141937

Owner	☒
Grantee	☒
Right	☒
Interest	☒
Copy	☒

STATE OF NORTH CAROLINA, }
COUNTY OF WAKE, } ss. REGISTER OF DEEDS
I hereby certify that the within instrument was
filed in this office for record on the 19th
day of _____ A. D. 1905, at
11:30 o'clock P. M., and was duly recorded in
Book 41 of Deeds on page 448.
By _____
REGISTER OF DEEDS
Deputy

Recording Fee 1.25

Subsequent Taxes and Special Assessments, or Install-
ments of Special Assessments, paid and transfer re-
corded this 19th day of _____ A. D. 1905, at 11:30 A.
M.
By _____
COUNTY AUDITOR
J. W. Johnson

Document No. 119240

WARRANTY DEED SELMER K. DANIELSON & WIFE TO
UNITED STATES

WARRANTY DEED

This deed, Made the 2d day of January A. D. 1942, by and between Selmer K. Danielson and Helen Danielson, husband and wife, of Charlson, McKenzie County, N. D. as parties of the first part, and the United States of America, post office address Washington, D. C., as party of the second part.

Witnesseth: That the parties of the first part, for and in consideration of the sum of One Hundred and No/100 Dollars (\$100.00) to them paid by the party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, convey, warrant, and confirm unto the party of the second part, and its assigns, forever, the following described real property, and its appurtenances, situate in the County of McKenzie, in the State of North Dakota, to-wit:

Northeast Quarter of the Southwest Quarter (NE $\frac{1}{4}$ -SW $\frac{1}{4}$) of Section Seven (7) in Township One Hundred Fifty-three (153) North, Range Ninety-five (95) West of the Fifth Principal Meridian, containing 40 acres, more or less, according to the United States Government survey thereof.

This conveyance is made subject to the reservations and exceptions contained in the patent from the United States and existing rights of way for public roads.

And the parties of the first part covenant with the party of the second part, that the former are now seized in fee simple of the property granted; that the latter shall enjoy the same without any lawful disturbance; that the same is free from all encumbrances; that the parties of the first part, and all persons acquiring any interest in the same through or for them, will, on demand, execute and deliver to the party of the second part, any further assurance of the same that may be reasonably required; and that the parties of the first part will warrant to the party of the second part all the said property against every person lawfully claiming the same; and

that the parties of the first part have good right, full power, and lawful authority to convey the said premises in the manner aforesaid.

In witness whereof, The parties of the first part have hereunto set their hands the day and year first above written.

Selmer K. Danielson,
 SELMER K. DANIELSON.
 Helen Danielson,
 HELEN DANIELSON,

No rev.

STATE OF NORTH DAKOTA,
County of McKenzie, ss:

On this 2nd day of Jan. 1942, before me, the undersigned authority, personally appeared Selmer K. Danielson and Helen Danielson, husband and wife, known to me to be the persons who are described in and who executed the within instrument, and acknowledged to me that they executed the same.

[JUSTICE OF PEACE SEAL] C. O. SIGURDSON,
J. P. in and for the County of McKenzie,
State of No. Dak.

My commission expires March 19th, 1942. Residing at Charlson, No. Dak.

Delinquent Taxes and Special Assessments, or Installments of Special Assessments, paid and transfer entered this 22nd day of January, 1942.

[COUNTY SEAL] ARNE TOLLEFSON,
County Auditor.
 By JEAN TOLLEFSON,
Deputy.

Filed for record on the 22 day of Jan. A. D. 1942 at 1:15 o'clock P. M. and was duly recorded in book 44 of Deeds on page 300.

E. F. RADDATZ,
Register of Deeds.

STATE OF NORTH DAKOTA,
County of McKenzie:

We, Deister, Ward & Witcher, Oil Abstractors, do hereby certify that the foregoing is a true and correct copy of Warranty Deed from Selmer K. Danielson and Helen Danielson, husband and wife, to United States of America of record in Book 44 of Deeds on page 300 within the office of the Register of Deeds of McKenzie County, North Dakota.

DEISTER, WARD & WITCHER,
Oil Abstractors.

By Pat DuPuis,
 PAT DUPUIS.

Made for Benefit of: The Texas Company, Denver, Colorado.

AFFIDAVIT

STATE OF COLORADO,
City and County of Denver, ss:

I, T. O. H. Mattson, being duly sworn, do herewith depose and say as follows:

That I am the Division Petroleum Engineer for The Texas Company, a Delaware corporation, in its Rocky Mountain Division, which includes the State of North Dakota, and have held this position ever since the year 1947.

That by virtue of my position aforesaid, and as a part of my duties, I am acquainted with, and maintain complete records covering all oil well drilling operations in the State of North Dakota, and have so done ever since The Texas Company commenced drilling operations in the State of North Dakota.

That I am acquainted with all oil developments in the lands covered by Federal Lease BLM A-016898, which lands are as follows:

Township 153 N., Range 95 W., 5th P. M. North Dakota
 Sec. 4: S $\frac{1}{2}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$;
 Sec. 5: Lots 2, 3, SE $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$;
 Sec. 7: Lots 4, E $\frac{1}{2}$ SW $\frac{1}{4}$;
 Sec. 9: NE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$;
 Sec. 15: NW $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$;

Range No. 95th, District of

DATE OF SALE.	NUMBER OF RECEIPT AND CERTIFICATE OF PURCHASE.	TO WHOM PATENTED.	DATE OF PATENT.	WHERE RECORDED.	
				VOLUME.	PAGE.

March 9-1916 021980 Williston. Relinquished Aug 10, 1916.

Nov. 7, 1914. 020930 Williston. F.B. April 5, 1918 - Pat. No 659495 - Jan. 15, 1919 -

Nov. 7, 1914. 020929 Williston. Relinquished Mar. 9, 1916

Aug 10, 1916 - 022529. Williston (add to Hd 0202842 in Dec 11-152-95.) Relinquished Dec 19, 1917.

Jan 3, 1918 021419 Bismarck Relinquished April 11, 1924
023252 Williston (add to Hd 015456 in Dec 19.) Canceled by Dec 19, 1924

March 25, 1926 022739 Bismarck Former Hd 021506 Area 4012, 153, 96th
(Canceled Feb. 13, 1928)

March 26, 1934 024344 Bismarck. F.C. Nov 30 1931 Pat 1107828 - April 11, 1940.

Nov. 7, 1914. 020931 Williston. F.C. May 29, 1918 Returned Apr 29/19 to 675801

80 — Act Feb 19, 1909, June 22, 1910, Claus H. Halstenson
Act Feb 19, 1909.
80 — Act June 22, 1910 Ole O. Hanger
Act Feb 10 1909
80 — Act June 22, 1910 023813 Otto T. Hamlin
Act June 22, 1910.
80 — 2d. Hd. appl. Nov. 29/21 made L. Staatten
40 19- 025004 - 4/19/48
17 153 16 32
17 153 16 32
80 — Act Feb 19, 1909, Arnold Klermoen
Act Feb 19, 1909, 024520
439.11 Oil & Gas, Act 2/15/1909
453N 96W, 024520, 10/14/51
80 — Act Feb 19, 1909, Arina Comrad
Act Feb 19, 1909, 037019 - Rejected.
Temp. - Withdrawn by Ex. Order 7/19/37 - 1686036 -
877 94 act 2-25-1920 Thomas H. Dorough
T 153N 96W 024520
S 16W 024520
S 16W 024520
9 153 93 - Designated Act June 13, 1912 by Sec. July 31, 1913, effective Aug. 30, 1913
Classified, coal land, 1000 - per area, 15, 1917 - 735805 -
320 - Act Feb 19, 1909, June 22, 1910 Otto O. Olson
160 - 14 - Marie H. Johnson
Act Feb 19, 1909, June 22, 1910 Ella Reynolds
Act Feb 19, 1909, June 22, 1910 Mary E. Beeny
Joseph Maurice Carter
021895 Sec 10
024558 Diamond, Cab. Crowley, Reel, Aug 27, 1937
All Temp. - Withdrawn by Ex. Order 7/19/37 - 1686036 -

Dec 31, 1930 022021 Williston. Cash 14121 Dec. 17, 1921. Canceled by 0 July 20, 1921.
Aug 28, 1916 022319 Williston. (add to Hd-07821 in Dec 20) Canceled by 0 April 1, 1922.
Sept 8, 1916 022326 Williston add. to Hd. 07093 Dec. 1-152-96W. F.C. April 3, 1921.
Sept 8, 1916 022630 Williston add. to Hd. 010829 Dec. 28-152W-95W. Relinquished Nov. 3, 1920.
Oct 27, 1922 023586 Williston 1st Hd-022057 Dec. 17 Canceled 2-12-1928.
April 2, 1934 024383 Bismarck. For Orig. Dec. 21 Hd. 42617. Canceled - Relinquished April 8, 1936.

See Aug 5, 1936
August 20, 1937- 024520 Bismarck - Canceled Nov. 18, 1939.

April 24-1907 024415 Cash Certif. Sept 16, 1908 Pat 54764 April 5, 1909.

April 1, 1911 025003 Bismarck

Aug 2, 1954 - Mailed Nov 15, 1954 - 8 a. m.

Sept. 11, 1913 018481 Williston Amended by C. Sept. 25, 1913 to Sec. 35-154W-95W.
Aug. 9-1907 3.088 Cash 07309 Williston Aug. 19, 1909 Pat 123594 April 14, 1910.

Nov. 7, 1914. 020932 Williston. F.C. May. 29, 1918 Put in suit Apr 29/19 - Jul 75 802.

Feb. 19, 1915 021093 Williston F.C. Aug. 22, 1918. Pat. 592742 - June 28, 1919.

Oct. 21, 1915-021825 Williston - F.C. May 15, 1919

drawn 200.2-1938

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Land Office, Billings, Montana

Bill 2 Has 7-17-14

Bismark
SERIAL No. 024344

M. Dwyer 2287 Ed.

Delmer K. Davidson
Chandler, R. D.

921111 7 153 95 40

DATE

NOTATIONS

over 21 years

1-19-34 App filed at 9 am. paid \$650 Rec. 3/5/34

3-26-34 Notice of Allowance issued
App to HLO Mar 31 at Rate .50184 by 24118.

2-8-35 C of 2-4-35, require Oil and Gas Mining. 24118 4-22-40

2-29-35 Above waiver filed. same to HLO. 5-11-40

3-21-39 5 yr X-Notice issued.

5-5-39 Notice of Distribution to Mark Dwyer filed.

7-6-39 Proof sub. before Judge G. R. Willson

Deliber 11. Dec. for Sept 1, 1939.

Callation in McHenry County fence

+ Macford Guide. Copy to D.A.C.

9-12-39 Final Proof & App of Gub. filed.

Ed. 11:00 am. Rec. Mar. 32/0098.

DATE

NOTATIONS

9-22-39

Notice for Republishion issued
setting date for Nov 10, 1939.
(Enclosed previous published notice)App. Modified to require an
date set. Copy to D.A.C. 24118

10-27-39

11-17-39

12-20-39

1-20-39

2-20-39

3-20-39

4-20-39

5-20-39

6-20-39

7-20-39

8-20-39

9-20-39

10-20-39

11-20-39

12-20-39

1-20-40

2-20-40

3-20-40

4-20-40

5-20-40

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Sec. 17: S $\frac{1}{2}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$;

Sec. 18, Lots 1, 2, 3, E $\frac{1}{2}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$,
W $\frac{1}{2}$ SE $\frac{1}{4}$;

Sec. 19: N $\frac{1}{2}$ NE $\frac{1}{4}$

and that my records show that The Texas Company has drilled six (6) oil wells in these lands, as follows:

Location (T. 153 N., R. 95 W.)	Date spudded	Date complet- ed drilling	Date put to produc- ing
NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 18.....	3-21-54	5-7-54	5-7-54
SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 7.....	6-26-54	8-7-54	8-14-54
SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 4.....	11-8-54	12-14-54	12-15-54
NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 4.....	12-20-54	1-23-55	1-24-55
SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 18.....	3-18-55	4-22-55	4-23-55
SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 4.....	7-19-55	8-16-55	8-16-55

Further deponent saith not.

T. O. H. Mattson.

T. O. H. MATTSON.

Subscribed and sworn to before me this 20th day of April, 1956.

[SEAL]

MARGARET B. SMITH,
Notary Public.

My commission expires September 7, 1959.

BLM-A 016898 ML: RWR
BLM 023993 (North Dakota)

Oil and Gas Lease for acquired lands BLM-A 016898 cancelled in part by decision dated February 16, 1954.

THE DIRECTOR,

Bureau of Land Management,

Department of the Interior, Washington 25, D. C.

NOTICE OF APPEAL

DEAR SIR: Please be advised that Thomas G. Dorough, whose post office address is 503 18th Street, Denver, Colorado, and who is the original lessee, duly approved by the Bureau of Land Management, of federal oil and gas lease BLM-A 016898, and The Texas Company, a Delaware Corporation,

whose post office address is Post Office Box 2100, Denver, Colorado, and who is the current holder by assignment, duly approved by Bureau of Land Management, of federal oil and gas lease BLM-A 016898, do herewith give notice of appeal from that decision of R. E. Hoffman, Chief of the Division of Minerals, Bureau of Land Management dated February 16, 1954, which decision cancels federal oil and gas lease BLM-A 016898 insofar as said lease covers the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, T. 153 N., R. 95 W., 5th P. M., North Dakota.

SPECIFICATIONS OF ERROR

I

That Thomas G. Dorough was never served with Notice of Contest herein, as required by the provisions of 43 C. F. R. 221.1 et seq., and hence was without opportunity to answer or defend, and he in fact did not answer or defend, wherefore subject decision was entered without jurisdiction or authority and is null and void.

II

That The Texas Company was never served with Notice of Contest herein, as required by the provisions of 43 C. F. R. 221.1 et seq., and hence was without opportunity to answer or defend, and it in fact did not answer or defend, wherefore subject decision was entered without jurisdiction or authority and is null and void.

III

That federal lease BLM-A 016898 is in fact an acquired lands lease, whereas subject NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, T. 153 N., R. 95 W., 5th P. M., North Dakota is alleged to be public domain lands insofar as the minerals therein are concerned, said distinction being the basis for the decision herein, and perhaps a valid distinction for the purpose of accepting or rejecting offers to lease, but that regardless of its status as acquired lands or public domain lands, it is in fact lands of the United States of America upon which lease BLM-A 016898 has issued prior to lease BLM 023993 and the United States of America is without statutory authority in this matter to avoid

its prior lease in whole or in part, whether or not erroneously issued in respect to its administrative regulations, said administrative regulations being only for the guidance of the United States of America and its agents in accepting or rejecting applications. The United States of America, in this matter, acts in a proprietary rather than governmental capacity, and, in the absence of express statutory authority compelling invalidation of its leases when issued pursuant to an erroneous application of said regulations, is bound by its acts as any other lessor.

Authorities in support of the specifications of error will be served and filed within twenty days from the date of service hereof.

Respectfully submitted,

(S) Thomas G. Dorough,
THOMAS G. DOROUGH,
503 18th Street, Denver, Colorado.

(S) William J. Flittie,
WILLIAM J. FLITTIE,
Attorney for the Texas Company,
P. O. Box 2100, Denver, Colorado.

VERIFICATION

STATE OF COLORADO,

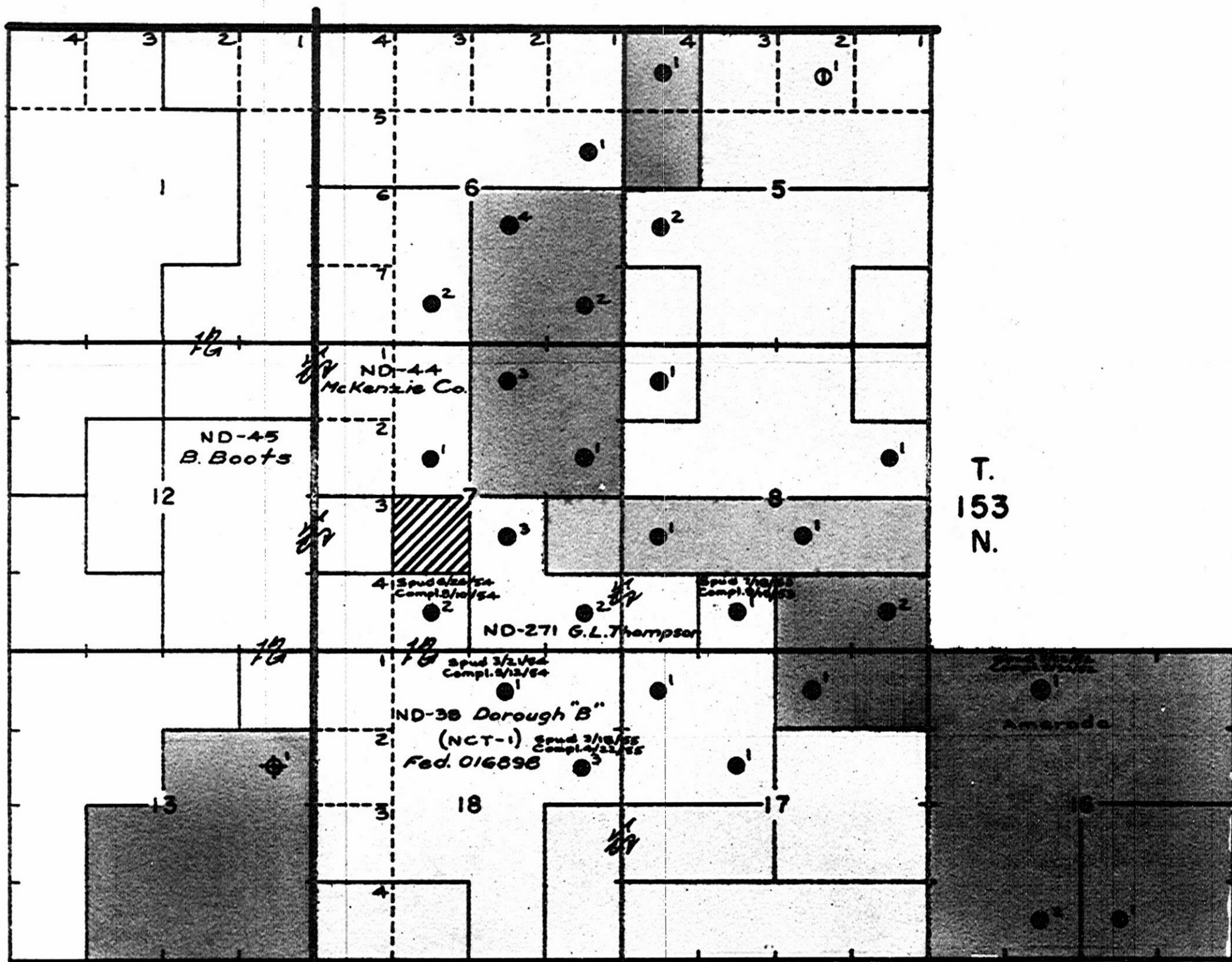
County of Denver, ss:

On this 17th day of March 1954 appeared before me Thomas G. Dorough, and William J. Flittie, known to me, and in the case of William J. Flittie known to be an attorney for The Texas Company, and subscribed their names to the above Notice of Appeal, and in subscribing their names did make their oath that the allegations of fact contained in said Notice of Appeal are true, or that they are true upon their information and belief.

Subscribed and sworn to before me this 17th day of March 1954.

(S) DONALD GUENTHER,
Notary Public.

My commission expires June 12, 1956.



R. 95 W.

- Producing well
- Drilling well
- ⊕ Dry hole
- T.T. Co.
- Amerada
- Hunt
- ▨ Area in question = part of Dorough "B" NCT-1

McKenzie County, No. Dakota
 3/6/56
 Rev. 4/5/56

BEST COPY AVAILABLE
 from the original bound volume

THOMAS G. DOROUGH

OIL LEASES—ROYALTIES

DENVER 2, COLORADO, *March 17, 1954.*

RE: PETITION FOR REINSTATEMENT OF PUBLIC DOMAIN
APPLICATION

Bismarck #025004

MANAGER, LAND OFFICE,
*Bureau of Land Management,
1245 North 29th Street, Billings, Montana.*

DEAR SIR: Enclosed herewith find Petition for Reinstatement of Public Domain Application Bismarck 025004. Please file said application and take appropriate action thereon.

An executed copy of this petition is being served by registered mail, return receipt requested, upon Mr. John Snyder, P. O. Box 258, Billings, Montana.

This is not a contest but an application for reinstatement pursuant to the law and regulation of the United States.

Very truly yours,

THOMAS G. DOROUGH.

TGD:F:n.

Registered mail RRR.

c. c. Mr. John Snyder, P. O. Box 258, Billings, Montana.

Petition for reinstatement of public domain application

Bismarck 025004

TO THE MANAGER,
*Billings Land Office,
Bureau of Land Management, Billings, Montana.*

DEAR SIR: Comes now Thomas G. Dorough, whose post office address is 503 18th Street, Denver, Colorado, and shows the Bureau of Land Management as follows:

I

That he applied for a federal oil and gas lease in NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, T. 153 N., R. 95 W., 5th P. M.,

North Dakota in his public domain application Bismarck 025004, duly, regularly and correctly filed April 19, 1948.

II

That on January 25, 1949, he was advised by W. H. Burnett, Regional Chief of Adjudication, Billings, Montana, that subject NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, T. 153 N., R. 95 W., 5th P. M., North Dakota was not public domain mineral land, but was acquired mineral land for oil and gas leasing purposes, which advice was in error, said lands now being acknowledged by the Bureau of Land Management to be public domain mineral lands, though probably erroneously treated by the Bureau of Land Management as acquired lands for oil and gas leasing purposes until as late as on or about April 24, 1953.

III

That relying on said erroneous advice he proceeded to take NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, T. 153 N., R. 95 W., 5th P. M., North Dakota under lease by federal oil and gas lease BLM-A 016898 dated December 1, 1951, as acquired lands, said lease being regularly issued by the Bureau of Land Management.

IV

That on April 24, 1953, by amendment to federal lease BLM 023993 dated March 1, 1952, the Bureau of Land Management placed subject NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, T. 153 N., R. 95 W., 5th P. M., North Dakota under lease to one John Snyder, which lease was issued pursuant to his public domain application dated May 11, 1951, said application and lease being in all respects subsequent to the said public domain application Bismarck 025004.

Wherefore Thomas G. Dorough herewith again tenders the sum of thirty dollars (\$30.00) as the requisite for filing fee and advance rental, and respectfully petitions the Bureau of

Land Management that since he was the first qualified applicant for a public domain lease on said NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, T. 153 N., R. 95 W., 5th P. M., North Dakota, which lands are public domain lands, he is entitled to a lease pursuant to law and regulations and therefore his application Bismarck 025004 should be reinstated effective as of April 19, 1948 insofar as it covers said NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, T. 153 N., R. 95 W., 5th P. M., North Dakota, and a federal oil and gas public domain mineral lease be duly issued pursuant thereto.

Respectfully submitted.

Thomas G. Dorough,
THOMAS G. DOROUGH,
503 18th Street, Denver, Colorado.

VERIFICATION

STATE OF COLORADO,

County of Denver, ss:

On this 17th day of March 1954, appeared before me Thomas G. Dorough, known to me, and subscribed his name to the above Petition for Reinstatement, and in subscribing his name did make his oath that the allegations of fact contained in said Petition for Reinstatement are true, or that they are true upon his information and belief.

Subscribed and sworn to before me this 17th day of March, 1954.

[SEAL]

DONALD GUENTHER,
Notary Public.

My commission expires June 12, 1956.

Memorandum by the Court

(Filed July 24, 1956)

WILKIN, *District Judge* (by Designation):

This is a contest between two lessees, the plaintiff, The Texas Company, and the intervenor, Snyder, each of whom holds an oil and gas lease on the same 40 acres of land (NE $\frac{1}{4}$ SW $\frac{1}{4}$, Township 153 N., Range 95 W., North Dakota) issued by the defendant, Secretary of Interior.

as indicated hereon, effective
March 12, 1955_____

September 13, 1955

Acres

Total area defined 12,215 --

The original complaint named only the Secretary of Interior as defendant; alleged that the defendant on or about February 16, 1954, had erroneously and unlawfully cancelled plaintiff's lease of said 40 acres; and sought judgment of this Court and an "injunctive order holding the aforesaid cancellation unlawful, and mandatorily directing the defendant to set the same aside." The defendant, John Snyder, intervened in order to sustain the Secretary's order of cancellation and protect his rights under his lease.

At time of trial, parties and counsel agreed that the real question in the case was, Which is the valid and prevailing lessee? It was further agreed that this Court should determine which lease has priority and legal precedence over the other, and that the prevailing lessee would be entitled to and should have an assignment, quit claim, or release from the opposing party, in order to quiet title in the prevailing lessee and clear the title as recorded in the office of the Recorder of Deeds at the proper situs in North Dakota.

The explanation of the issuance of the two conflicting leases is found in the following facts and circumstances, as to which there was no dispute:

An Act of Congress of February 25, 1920 (30 U. S. C. 181, et seq.) gave to the Secretary of the Interior authority to grant oil and gas leases on lands constituting a part of the public domain. By practice, and by interpretation of the courts, such authority was restricted to the public domain or lands never acquired by private owners.

Congress, thereafter, by Act of August 7, 1947 (30 U. S. C. 351, et seq.) invested the Secretary of the Interior with authority to grant leases on land which had been acquired by private owners, but had subsequently been conveyed back to the United States.

Due to these separate enactments and certain other laws and regulations regarding the public domain and acquired land, and different methods of accounting for the proceeds or income from the two different kinds of land, the Department of Interior set up and maintained separate offices and agencies for the administration of the laws and regulations regarding the two different kinds of land. A field office was established for

the management of the public lands of North Dakota, and applications for leases of such lands were required to be filed in that District Office. A separate office, known as Bureau of Land Management, was set up and maintained in Washington for the management and control of acquired lands, and applications for leases of such lands were required to be filed in that Washington office.

On April 11, 1940, the surface of the 40 acres involved in this controversy was conveyed by patent grant from the United States to Selmer K. Danielson (This patent was not recorded until December 19, 1952, in Deed Book 67, page 45, of McKenzie County, North Dakota). The patent grant, however, reserved all minerals under the 40 acres.

On January 2, 1942, Selmer K. Danielson and Helen Danielson conveyed back to the United States the 40 acres by deed recorded January 22, 1942, in Deed Book 42, page 300 of McKenzie County, North Dakota. By the rules and regulations in force, the surface of the 40 acres then became *acquired land*, but the oil and gas and other minerals underlying the 40 acres remained public domain.

On April 19, 1948, Thomas G. Dorough filed a proper application (Exhibit 1) for oil and gas lease on 2080 acres, including the 40 acres in controversy. The application was filed in the Land Office for North Dakota, in accordance with the Act of 1920 governing public land (Ex. 28, p. 7).

On January 25, 1949, the Regional Chief of the Land Office for North Dakota wrote to the applicant, Dorough, as follows:

The only public domain land included in your application is described as [description did not include the 40-acre tract in controversy].

In view of the fact that the above land is the only land that may be included in a lease under the leasing act of February 25, 1920, it is suggested that you file a new application covering the balance of the land. Such application should be filed direct in the Bureau of Land Management Office in Washington, D. C. Your application should clearly show that it is an application for acquired land.

On February 3, 1949, the applicant, Dorough, replied to the letter of the Regional Chief as follows:

I am in receipt of your letter of January 25, 1949, regarding the above mentioned oil and gas lease application on Government lands. In view of the fact that only 200 acres of the lands desired, proved to have the status of vacant public lands, it is my desire that the entire application be forwarded to the Bureau of Land Management, Washington, D. C., with a request that it be treated as an application for an oil and gas lease on acquired lands, thus retaining its filing time and date priority.

Enclosed herewith please find a separate application on the following described lands, in connection with other lands.

(Description did not include the 40 acres.)

On May 14, 1951, the intervenor, Snyder, filed an application (Exhibit 13) in the Land Office for North Dakota, in accordance with the Act of 1920 for a lease on public land, including the 40 acres in controversy.

On December 1, 1951, Dorough received a lease (Exhibit 10) from the Land Management Office in Washington for 1670 acres in accordance with the Act of 1947 for acquired lands, including the 40 acres in controversy.

In 1953, Snyder received an oil and gas lease on the 40 acres. His application of May 14, 1951, was at first rejected by the Land Office as to the 40 acres (NE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 7).

On November 3, 1952, Snyder filed an "appeal from decision of Manager rejecting a part of oil and gas lease application" (Exhibit 15), and called attention to the fact that the oil and gas under the 40-acre tract was reserved to the United States when a patent had been granted to Danielson. He, therefore, requested that his lease be corrected to include the oil and gas under the 40 acres, because it was a part of the public domain.

In March of 1953, the oil and gas underlying the 40 acres were added to the lease granted to Snyder (Stipulation, Exhibit 21).

On January 22, 1954, Snyder wrote to the Director of Bureau of Land Management in Washington and called his attention to the fact that a lease had been granted to him, and also to Thomas Dorough on the same 40-acre tract and stating that the lease to Dorough had been issued in error, and said:

in order to clear up any discrepancy in the title to my lease, I request that you cancel lease BLM-A 016898 as it effects the above described land. (Ex. 18.)

Thereafter an order cancelling the 40 acres from the plaintiff's lease was entered, and the plaintiff, having been assigned the rights and interests of Thomas G. Dorough, was notified of such cancellation.

The Act of 1920 requires that the Secretary issue a lease to the first qualified person who files an application. Both lessees were qualified applicants. It was conceded by counsel for the parties that the issue was a question of law: Which is the valid and subsisting lease in view of the facts and circumstances presented by the stipulation and the exhibits?

All parties based their contentions upon Section 17 of the Act of 1920 (30 U. S. C. 226), which provides that the applicant prior in time shall be prior in right. The plaintiff insisted that the application of Dorough, filed in 1948, was the first application for the 40 acres. Plaintiff contended that the subsequent filing of a supplemental application for 200 acres of public land, and the request that the original application be sent to the Bureau of Land Management in Washington to "be treated as an application for an oil and gas lease on acquired lands, thus retaining its filing time and date priority" cannot nullify the filing date of the application and its priority.

The defendants contended, on the other hand, that (1) plaintiff's original application was not a proper application; and (2) if proper, in the circumstances it was withdrawn and cancelled as an application for public lands by the request of the applicant that it be sent to Washington to be treated as an application for lease of acquired lands.

The evidence is clear and convincing to this Court that the plaintiff's 1948 application was the first application for the 40-acre tract. That fact is patent and cannot be controverted

by legal technicalities regarding the propriety of the application. The failure of the applicant to receive a lease for the 40 acres from the District Land Office of North Dakota was due to a mutual mistake of the Manager of the Land Office and the applicant. Because the surface of the 40 acres had been changed from "public" to "acquired" land, the applicant and the officer of the Land Office construed the application as a request for a lease of acquired lands, and referred the application for the 40 acres and some other acquired land to the Washington Office. When the mistake was discovered, and the oil and gas under the 40 acres was recognized as public domain, the application as to that acreage should in justice have been referred back to the District Land Office to be treated as an application for public land, as it had been referred to Washington when it was thought to be an application for acquired land; and the 40 acres should then have been included in the lease granted by the District Office on the supplemental application filed by Dorough in 1949.

The defendants' contention that Snyder's application was first in time is a misstatement of fact. The contention of the defendants that the reference of the original application to Washington was an abandonment or cancellation of Dorough's application for public lands is a misconstruction of the facts.

In 1949 Dorough had a pending application in the District Office for a public land lease and an application pending in Washington for an acquired land lease. Both applications antedated the Snyder application. Through a misunderstanding regarding the separation of the surface from the oil and gas under the surface of the 40 acres, the original application as to the 40 acres was referred to Washington, and a lease was issued to the applicant for a large acreage of acquired land, including the 40-acre tract. Dorough's applications were prior to the applications of Snyder, and the leases granted to Dorough were prior to the leases granted to Snyder. The leases to Dorough, for all the lands mentioned therein, were valid and proper as the facts and circumstances were understood at that time. The only discrepancy was the listing in the Washington lease of the 40 acres as "acquired" instead of "public" land.

Such a mistake could and should have been corrected by the Department of the Interior either by a correction of the records in its control or by the cancellation of the 40 acres from the Washington lease and the issuance of a supplemental lease for the 40 acres of public lands by the District Land Office, or by adding it to the plaintiff's public land lease (as was done for Snyder after his appeal). All leases come from the same source, the Secretary of the Interior. The separate offices or bureaus for the two kinds of land were merely a provision for the convenience of the Department of the Interior. The identity of the grantor-lessor supports the contention of the grantee-lessee as to the identity of his application, in spite of its processing by separate divisions of the Department of Interior.

The intervenor, Snyder, insists that the records were available to Dorrough, and that Dorrough should be held to have lost his application for the 40 acres, because he did not insist on a lease from the District Land Office for the 40 acres as public land. The responsibility for the mistake must be shared by the defendant Secretary, as well as by the applicant, and Snyder is in no position to take advantage of the mistake because the records were available to him and he, no doubt, knew, or should have known, of the prior application and the method of its processing.

There is no need to discuss other tangential issues and objections. In view of the law and the undisputed facts and circumstances, the plaintiff and its assignor are prior in time and prior in right.

Where two conflicting patents have been issued by the United States, each purporting to confirm the same tract of land to a different party, the senior patent is conclusive of the title; and if the question is solely between the two patents, the junior patent is void. (43 U. S. C. A. p. 45, note 24.) *Gallipot v. Manlove*, 2 Ill. 156; *Garner v. Willett*, 18 Ill. 455.

This opinion will serve as findings of fact, and conclusions of law. An order and judgment may be prepared and submitted by counsel for the plaintiff.

R. N. WILKIN,
U. S. District Judge.

WASHINGTON, D. C., *July 24, 1956.*

Final order and judgment

(Filed August 16, 1956)

This cause coming on for final hearing and after argument by counsel for plaintiff and counsel for each defendant, and upon consideration of the pleadings, stipulations and agreements of the parties, and exhibits on file, and it appearing to the Court that plaintiff is the owner of an oil and gas lease (BLM-A-016898) made December 1, 1951, to its assignor with respect to forty (40) acres of land in North Dakota (NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 7; Township 153 North, Range 95 West, 5th P. M.) by Douglas McKay, then Secretary of the Interior and the predecessor of defendant Fred A. Seaton, present Secretary of the Interior, and the said Douglas McKay, in March or April, 1953, made a lease of the oil and gas rights on the same forty (40) acres of land to intervenor-defendant, John Snyder, and thereafter, purported to cancel the lease of plaintiff; and it further appearing to the Court that plaintiff's assignor was the first qualified applicant for the lease of said property within the meaning of Section 17 of the Mineral Lands Leasing Act of February 25, 1920 (30 U. S. C. 226) and that said lease was in all respects validly and properly issued under authority of law and that the subsequent purported cancellation thereof was arbitrary, capricious and without authority of law, all as set forth in more detail in the findings of fact and conclusions of law, embodied in the Memorandum of the Court dated July 24, 1956, it is this 16th day of August 1956,

Ordered and adjudged that the purported cancellation of plaintiff's lease (BLM-A-016898) of the oil and mineral rights on the property above-described (dated February 16, 1954,

and affirmed in a hearing *de novo* on August 10, 1954), be and it is hereby set aside and held for naught, and defendant Fred A. Seaton, individually and as Secretary of the Interior, be and he is hereby ordered and directed, within thirty days after the entry of this order and judgment, to restore said lease in full force and effect, and intervenor-defendant, John Snyder, be and he is hereby, ordered and directed, within thirty days after the entry of this order and judgment, to surrender to the Secretary of the Interior for cancellation the lease made to him on the said property and to file such instruments and make such entries in the records of McKenzie County, North Dakota, and elsewhere, that will make this judgment, in all respects, final and conclusive as to the rights of the parties everywhere. This judgment is to be without costs as to any party.

R. N. WILKIN,
Judge.

Service of a copy of the above order received and acknowledged this 7th day of August 1956.

W. H. W.,
WALTER H. WILLIAMS,
Attorney for Defendant Seaton.

PERLMAN, LYONS & BROWNING,
By JAMES R. BROWNING,
Attorneys for Intervenor-Defendant Snyder.

Order modifying final order and judgment

(Filed September 7, 1956)

For good cause shown and there being no opposition, the application by defendant and intervenor, filed August 16, 1956, for modification of the final order and judgment entered in this cause on the same day is hereby granted so that the last paragraph of said final order and judgment is changed to read as follows:

Ordered and adjudged that the purported cancellation of plaintiff's lease (BLM-A-016898) of the oil and

mineral rights on the property above-described (dated February 16, 1954, and affirmed in a hearing de novo on August 10, 1954), be and it is hereby set aside and held for naught, and defendant Fred A. Seaton, individually and as Secretary of the Interior, be and he is hereby ordered and directed, within sixty days after the entry of this order and judgment, or within thirty days after the final disposition of any appeal that may be taken from this final order and judgment, to restore said lease in full force and effect, and intervenor-defendant, John Snyder, be and he is hereby, ordered and directed, within sixty days after the entry of this order and judgment, or within thirty days after the final disposition of any appeal that may be taken from this final order and judgment, to surrender to the Secretary of the Interior for cancellation the lease made to him on the said property and to file such instruments and make such entries in the records of McKenzie County, North Dakota, and elsewhere, that will make this judgment, in all respects, final and conclusive as to the rights of the parties everywhere. This judgment is to be without costs as to any party.

R. N. WILKIN,
Judge.

BRIEF FOR APPELLEE
United States Court of Appeals
For the
District of Columbia Circuit

FILED APR 4 1957

IN THE
United States Court of Appeals
Joseph W. Stewart

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13636

FRED A. SEATON, SECRETARY OF THE INTERIOR,
Appellant,

v.

THE TEXAS COMPANY, A CORPORATION, *Appellee*

AND

No. 13637

JOHN SNYDER, *Appellant,*

v.

THE TEXAS COMPANY, A CORPORATION, *Appellee.*

Appeals from a Judgment of the United States District Court
for the District of Columbia

ROGER J. WHITEFORD,
JOHN J. WILSON,
PHILIP S. PEYSER,
815 15th Street, N. W.
Washington 5, D. C.
Attorneys for Appellee,
THE TEXAS COMPANY.

WALTER E. WILL,
Of Counsel

March 26, 1957

QUESTIONS PRESENTED

Appellee's assignee was the first qualified applicant for an oil lease on forty (40) acres of *acquired* land with reserved *public domain* oil rights. The application was on the proper form and filed in the proper place for an oil lease of public lands. Due to the mistaken belief of the Field Manager that the rights were in acquired lands the application with the consent of applicant was forwarded to Washington to be handled as an application for an oil lease of acquired land. On the basis thereof, a lease was issued describing the oil rights as in acquired land. Later appellant Snyder filed an application for a lease as public land and received such a lease. In the circumstances, the questions presented are:

1. Was the lease issued to appellee a valid lease?
2. In the absence of a showing of fraud, deceit, imposition or actual lack of power to lease, did the Secretary of the Interior have power to cancel appellee's lease unilaterally, as an administrative matter, without resort to the courts?
3. In view of the fact that at the time of purported cancellation this land was in a producing field, was the Secretary not specifically prohibited by statute and regulation from cancellation, except through an appropriate judicial proceeding?

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13636

FRED A. SEATON, SECRETARY OF THE INTERIOR,
Appellant,

v.

THE TEXAS COMPANY, A CORPORATION, *Appellee*

AND

No. 13637

JOHN SNYDER, *Appellant,*

v.

THE TEXAS COMPANY, A CORPORATION, *Appellee.*

Appeals from a Judgment of the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

While the statement of the case in the brief of appellant Seaton is essentially accurate as to details which are stated, it fails notably to include the crucial facts determinative of the entire case.

The application which appellee's assignor, Dorough, filed was first in point of time and he was a qualified applicant. The application was on the proper form prescribed by the Secretary for use in applications under the 1920 Act and was filed in the proper place. This application furnished a sound basis for the issuance of an appropriate lease. In fact, in the Solicitor's Opinion, this statement is made (Jt. App. 12a):

"Dorough's original application for the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 7 (Bismarck 025004) appears to have been a proper application for a noncompetitive public domain oil and gas lease and a lease could have been issued on it."

During the argument below counsel for appellant Seaton conceded this fact in this language (Jt. App. 32a):

"He did have a proper application at that time for a public land lease on this 40 acres, but he didn't have a good application for the rest of it."

* * * * *

"THE COURT. Let me inquire. Could the Land Office have granted a lease on that part of the application which covered public land at that time?"

"MR. WILLIAMS. In 1948 the Manager of the District Land Office could have granted a lease on the public land; he could not grant a lease on acquired land." (Jt. App. 33a)

* * * * *

"MR. WILSON. * * *

Your Honor, it is not now before us, but there has been in this record a great discussion about mixed applications, partly for acquired lands and partly for public domain lands and what has to be done with a mixed application.

"THE COURT. In view of Mr. Williams' concession, which you properly said was forthright, I don't think you need to discuss that. That's why I asked the question." (Jt. App. 34a)

The ultimate finding of the Court was:

"The defendant's contention that Snyder's application was first in time is a misstatement of fact. The contention of the defendants that the reference of the original application to Washington was an abandonment or cancellation of Dorough's application for public lands is a misconstruction of the facts." (Jt. App. 75a).

STATUTES AND REGULATIONS

Pertinent regulations, in addition to those set forth in the Appendix to the brief of appellant Seaton, are set forth in the Appendix hereto.

SUMMARY OF ARGUMENT

1. The record is clear beyond controversy, and it is conceded by appellant Seaton, that Dorough, appellee's assignor, was the first qualified applicant, that he filed a proper application, in the proper place, and that it satisfied all the conditions precedent to the issuance of a valid lease to him. The controversy relates to the legal effect of Dorough's acquiescence in the transfer of the application to Washington for consideration as an application for an oil lease in acquired lands. The District Court found that this occurred as the result of a mutual mistake of fact by the Manager of the District Land Office and Dorough as to the existence of the reservation of oil and gas rights in the patent to Danielson, and that the contention of appellants that this action amounted to "an abandonment or cancellation of Dorough's application for public lands is a misconstruction of the facts." This finding, being supported by substantial evidence, is conclusive and binding upon this Court.

2. The argument that "public lands and acquired lands are different by congressional declaration" is not supported by the legislative history of the 1947 Act or the statute itself. The congressional intent is clear that Congress expected and desired the two statutes to be ad-

ministered in identically the same way, except for the necessity of obtaining the consent of the Government agency having control of the surface. The clear overriding purpose of the legislation was to obtain uniformity in administration which was not being realized in handling by separate agencies.

3. Appellee's assignor satisfied the statutory requirements of being the first qualified applicant. The argument of appellants, as to the need for a "proper" application, has no basis in the statute or in the regulations. By this argument appellants seek to give the Interior Department a discretion in accepting or rejecting applications, that Congress did not give it. This question is actually moot in this case because of the uncontroverted fact (conceded by appellant Seaton) that the application filed by Dorough was proper as to form, as to the place of filing, and in all other respects.

4. Appellant Seaton's brief, at page 30, recognizes the series of mistakes which gave rise to the present situation. Nevertheless, it seeks to place the entire responsibility upon Dorough alone. To support this theory, appellant is compelled to make several unrealistic contentions, namely, that Dorough's acquiescence in the transfer of his application to Washington for consideration as an application for oil rights in acquired lands amounted to, legally, (1) a rejection of his application and (2) a failure to appeal and exhaust his administrative remedy. There is no factual support in the record for this conclusion.

5. The decision of the Secretary in this case is inconsistent with or contrary to prior decisions. On the basis of recognized decisions in effect prior to this case, a senior application rejected on erroneous ground could have been reinstated and given priority. The decision repudiating this doctrine was made on the same day as the decision of the Solicitor in this case. There is no basis for the argument that the ruling in this case followed

consistent administrative decisions. Under established practice, a ruling changing prior established interpretation of regulations should have been applied prospectively only, and not retroactively.

6. Under numerous decisions in land patent cases, the Supreme Court has held that the Secretary of the Interior has no power to revoke or cancel an issued land patent, and must resort to judicial proceedings to effect such cancellation. The Fifth Circuit has held that these principles apply to the issuance of oil leases. The decision of this Court in *McKay v. Wahlenmaier*, 96 U.S. App. D.C. 313, 226 F.2d 35, in which the Court found that there was fraud and imposition in the filing of the application, should not be construed as being contrary to the patent land cases, as to the need for a judicial proceeding to cancel appellee's oil lease.

7. The record shows that at the time of the purported cancellation, oil was being produced by The Texas Company on adjacent leases. In such circumstances, even if there had been a default in the payment of rental, the lease under its expressed terms could not have been cancelled except in a judicial proceeding. Under established principles of construction, the expressed power to terminate the lease in connection with defaults excludes the existence of any implied administrative power to cancel on any other ground. Under the statute, regulations, and terms of the lease, a judicial proceeding was necessary to effect cancellation.

ARGUMENT

1. THE FINDINGS OF THE DISTRICT COURT THAT APPELLEE'S ASSIGNOR WAS THE FIRST QUALIFIED APPLICANT WERE BASED UPON SUBSTANTIAL EVIDENCE AND SHOULD BE AFFIRMED

The findings of the District Court are set forth in the Memorandum Opinion (J.A. 69a-77a). The underlying facts are not in dispute. Appellee's assignor, Dorough,

filed on April 19, 1948, the first application for these forty (40) acres as rights in the public domain. The District Manager advised Dorough that this was acquired land and that the application should be filed in Washington. Accordingly, Dorough asked that the application be forwarded to Washington "retaining its filing time and date priority" (J.A. 41a). On December 1, 1951, he received a lease as for acquired lands (J.A. 45a). On May 14, 1951, Snyder filed an application for a lease of the same forty (40) acres as land in the public domain. Although his application was first rejected, it was later granted because of the determination that the oil and gas rights in the land had been reserved to the United States, in the issuance of the original patent to the homesteader Danielson on April 11, 1940. The lease to Snyder of November 1, 1952, (J.A. 49a) was amended in March, 1953, to include these forty (40) acres. At the request of Snyder (J.A. 54a), Dorough's lease was cancelled (J.A. 55a). On appeal to the Secretary, the Solicitor of the Interior Department, acting for the Secretary, affirmed the decision of cancellation (J.A. 7a-16a).

The basis of the Solicitor's decision seems to be that although Dorough's application was first in time and proper both as to form and place of filing, it was converted into an application for acquired lands when it was forwarded to Washington and therefore would no longer furnish a sound basis for a lease of land in the public domain. There is no question as to Dorough's qualification as an applicant. There is no question of any impropriety on the part of Dorough in obtaining the lease.

The Court below found that Dorough filed the first application for the tract and the "contention that Snyder's application was first in time is a misstatement of fact." He further found that this patent fact "cannot be controverted by legal technicalities regarding the propriety of the application" (J.A. 75a). Everyone concedes that Dorough was a qualified applicant. Therefore, these

findings, which are not controverted, bring Dorough within the requirements of the statute for priority and preference. Actually, it was conceded in the opinion of the Solicitor that Dorough's original application was a proper one (J.A. 12a) and this concession was likewise made by counsel for appellant Seaton at the trial (J.A. 33a, 34a). Consequently, appellants' arguments as to the need for a "proper" application presents a moot question, at least insofar as the defendant Seaton is concerned, by reason of the concession of counsel.

One of the principal questions decided by the District Court was the legal effect of Dorough's acquiescence in the transfer of the application to Washington for consideration as an application for an oil lease in acquired lands. The Court found that this "was due to a mutual mistake of the Manager of the Land Office and the applicant" (J.A. 75a). The Court further found that: "The contention of the defendants that the reference of the original application to Washington was an abandonment or cancellation of Dorough's application for public lands is a misconstruction of the facts." (J.A. 75a). This matter is covered by the letters of January 25, 1949, and February 3, 1949 (J.A. 40a, 41a). It is clear from the latter that Dorough was most anxious, in requesting that the application be treated as an application for an oil and gas lease of acquired lands, that it retain its "filing time and date priority". There is nothing to indicate any intention on his part to abandon, waive or cancel any rights that he then had. To the contrary, his effort was to preserve those rights. The obvious intention of both the Field Manager and Dorough was to make the simplest adjustment in the handling of the application so that the desired leases might be issued. This action was in accordance with the duty and instructions to the Field Manager to "forward all matters requiring action by the Director or the Secretary" 43 C.F.R. 50.33 (1946 Supp.). The mutual mistake of

fact to which the Court referred was with respect to the reservation of oil and gas rights in the Danielson patent. Although this patent was issued in 1940 it was not filed in the land records of McKenzie County, North Dakota, until December 19, 1952. (J.A. 59a)

There is no doubt that the Secretary had authority to issue the lease. The question is whether appellee's lease is invalid because it purports to be a lease of acquired lands rather than rights reserved in the public domain. The Court below found that in either event the source of the lease was the same, namely, the Secretary of the Interior, that all conditions precedent had been satisfied and that the only error was in its designation by the Department of the Interior as for acquired land instead of rights in the public domain. The Court found that this related to an internal departmental matter that the Department had the power to correct, without impairing the rights of appellee.

Finally, the Court referred to the principle of the patent cases, that the senior patent must prevail over the junior patent in all ordinary circumstances. This reference to the patent cases points up the fact that this is not a case of trying to control an administrative action of the Secretary but to prevent him from administratively cancelling and destroying a definitive, subsisting lease and property right which he had issued. Non-compliance with Departmental procedures may furnish a basis in certain instances for refusing or rejecting applications but once the lease has been issued, the failure to comply with non-substantial formalities or procedures should be of no consequence. This finding of the Court below should be construed as finding and holding that no basis has been shown, in law or equity, for the purported cancellation of appellee's lease.

At this point we pause to combat a point made in appellant Seaton's brief at page 13, where it is claimed that this decision would seriously encroach upon the doctrine of finality of administrative decisions. The argument fails

to distinguish the great difference in the administrative attempt to cancel and wipe out the property rights in an issued lease, and an administrative act with respect to internal matters of the Department. This case relates to the attempt of the Secretary to set aside his own final act issuing the lease, because of alleged procedural defects in the filing of the application. There is no question of exhaustion of administrative remedy, because appellee received the lease that it sought.

On the issue of the right of the Secretary to cancel appellee's lease, the Court below correctly determined the facts and those findings, being based on substantial evidence, are conclusive and binding upon this Court.

2. THE LEGISLATIVE HISTORY OF THE 1947 ACT SHOWS ITS IDENTITY OF PURPOSE WITH THE 1920 ACT, WITH SUBSTANTIALLY IDENTICAL STATUTORY REQUIREMENTS OF ADMINISTRATION

The heading on page 20 of appellant Seaton's brief asserting that public lands and acquired lands "are different by congressional declaration" leaves the impression that Congress has created a dichotomy which must be held to be irretrievably separate and distinct. This is far from an accurate picture. The legislative history of the Mineral Leasing Act for Acquired Lands, of August 7, 1947, c. 513 (61 Stat. 913, 30 U.S.C., 351 et seq), hereinafter called the 1947 Act, shows conclusively the identity of the Congressional intention and purpose, with the Mineral Lands Leasing Act of February 25, 1920, c. 85 (41 Stat. 437, 30 U.S.C. 181 et seq, hereinafter called the 1920 Act, minor differences in administration arising entirely from the fact that the origin of the two types of land was different.

The 1920 Act authorized the making of leases and prospecting permits with respect to oil and gas rights and lands containing such deposits "owned by the United States", with certain exceptions there indicated. This

statute, though broad in terms, was strictly construed as applying only to lands and rights in the public domain. *West v. Work*, 56 App. D.C. 191, 11 F. 2d 828. However, Section 34 of the original Act made its provisions applicable to mineral deposits in lands "disposed of under laws reserving to the United States such deposits" (30 U.S.C. 182). Lands or rights that were acquired from any other source were not regarded as being subject to the provisions of this general statute. The differing requirements of the several agencies acting under special statutes with respect to lands acquired by them, gave rise to considerable complaint and eventually resulted in the enactment of the 1947 Act, which constituted a broadening or enlarging of the 1920 Act.

The legislative history of the 1947 Act is set forth in 1947 U. S. Code Congressional Service, page 1661 *et seq.* The following is taken from that history:

"EXPLANATION OF THE BILL

"The purpose of this bill is to promote and encourage the development of the ore, gas, and other minerals on the acquired lands of the United States on a uniform basis under the jurisdiction of the Department of the Interior.

"The Department of the Interior, under the Leasing Act of 1920, as amended, has had long experience in the leasing of lands for oil, gas, and other minerals on the public domain. In 27 years, it has assembled the necessary personnel to handle the many administrative, legal, and technical problems presented under that act. The purpose of this bill is to grant to the Interior Department jurisdiction to lease acquired lands of the United States including those in Alaska, under the same conditions as contained in the leasing provisions of the Mineral Leasing Act; provided that no mineral deposit shall be leased except with the consent of the head of the executive department, independent establishment, or instrumentality having jurisdiction over the lands containing such deposit, in order that any lease issued will be on such conditions

as will insure the adequate utilization of the lands for the primary purpose acquired.

"In the interest of economy, the bill eliminates several agencies now engaged in the leasing of acquired lands for oil and gas, and centralizes this function in the Department of the Interior. The proposed legislation extends the mineral leasing laws now applicable to public domain lands, to all acquired lands, with certain exceptions.

* * * * *

"This bill likewise provides that regulations issued under the mineral leasing laws shall apply insofar as possible.

"The bill is designed to stimulate the exploration of new petroleum reserves, and to promote the development of oil and gas on acquired lands in line with the recommendation of the Secretary of the Interior in his Annual Report for 1946, which states (p. 32):

'The management of all the minerals in all the Federal lands should be in the experienced mineral agencies in Interior, rather than in several separate Federal departments. Certain changes in the mineral leasing laws should be considered by Congress.'

"The Special Senate Committee Investigating Petroleum Resources in its report, dated January 31, 1947 (p. 49), recommended as follows:

'In addition to the public-domain lands within the United States, the Federal Government also owns extensive areas commonly referred to as "acquired lands". * * * These lands are not subject to the mineral leasing laws covering the public-domain lands. Some of the acquired lands have been leased for oil or gas development, but it is clear from evidence presented to the committee that exploration of acquired lands has been retarded (a) by lack of statutory authority to lease, (b) by divided jurisdiction among various departments of Government, and (c) by a want of uniformity in policy and leasing procedure. The Senate should give early consideration to the various postwar problems arising

from the large amount of recently acquired lands, both as to their disposal and to their mineral deposits.' ”

The only substantial difference in the requirements of the 1947 Act over those of the 1920 Act was the necessity of obtaining the consent of the head of the executive department having jurisdiction over the land, who was permitted to prescribe conditions “to insure the adequate utilization of the lands for the primary purposes for which they have been acquired” (30 U.S.C. 352). Section 7 of the Act (30 U.S.C. 356) also requires the heads of the executive departments to furnish the Secretary with documents and details concerning the title.

This Act is broad in scope and includes all the lands owned by the United States, except where specifically excluded and even includes the lease of partial or future interests in the deposits (30 U.S.C. 354).

Section 3 (30 U.S.C. 352) provides that such lands “may be leased by the Secretary under the same conditions as contained in the leasing provisions of the mineral leasing laws, subject to the provisions hereof”.

Section 10 of the 1947 Act (30 U.S.C. 359) requires the identity of regulations with the 1920 Act, to the extent applicable. That section is as follows:

“§ 359. Rules and regulations

The Secretary of the Interior is authorized to prescribe such rules and regulations as are necessary and appropriate to carry out the purposes of this chapter, which rules and regulations shall be the same as those prescribed under the mineral leasing laws to the extent that they are applicable. Aug. 7, 1947, c. 513, § 10, 61 Stat. 915.”

From the above review of the legislative history of the 1947 Act, it is clear that Congress intended that the 1947 Act should complement or supplement the statutory au-

thority of the Department of the Interior over the leasing of mineral rights and lands, without distinction or limitation as to the origin of such rights. It is apparent that the two Acts must be considered and construed together. The one substantial difference in the administration of the two Acts is the requirement of obtaining the consent of the head of the executive department which acquired the land. This was an *additional requirement* in the approval of leases of acquired lands, which made necessary their consideration in Washington and constitutes the only difference in the statutory requirements for the leases under the two Acts. Much of the argument in the brief of appellant Seaton is based upon the fact that the gross receipts under the 1947 Act are distributed in the same way as the receipts from other lands acquired by the particular agency, whereas the 1920 Act provides a specific formula of distribution. This is a minor accounting matter which certainly should have little bearing upon the question of the validity of the lease here involved.

Congress created a mere semblance of dual control in connection with acquired lands, where authority over the mineral rights is vested in the Secretary of the Interior, while use of the surface remains in the acquiring agency. This diversity of control was inherent in this situation. But, at the same time, Congress intended to establish the identical terms and basis of leasing of oil rights, whether in public land or in acquired land, and to bring about this uniformity, Congress vested the power to lease in the Secretary of the Interior, with specific instructions to apply the identical rules and regulations "to the extent that they are applicable". Clearly, this means that the same treatment and method of handling should be followed by the Secretary, the only difference being in the fact that approval of the agency is also necessary. Congress did everything that it had power to do to make the leasing of the two types of land identical. For all practical purposes the 1947 Act was merely an extension of the 1920

Act to acquired lands, and the contention of defendant Seaton that the two types of land are "different by congressional declaration" is inaccurate.

3. THE STATUTORY PREFERENCE IS GIVEN TO THE FIRST QUALIFIED APPLICANT WHETHER THE PROPERTY IS IN THE PUBLIC DOMAIN OR ACQUIRED

Much of the argument of appellants centers around their contention that in order to obtain a preference, an applicant must file a *proper* application and that appellee's assignor did not file such an application. As a part of this contention appellant Snyder contends that mixed applications were forbidden, apparently meaning that an application which contained both public domain land and acquired land was contrary to the regulations. There is nothing in the statute or the regulations* with respect to these points. The most that can be said is that the indicated places of filing were different, in that public domain applications were to be filed with the Field Manager, while applications for acquired land were to be filed in Washington. Under the existing regulations, if an application were erroneously filed with the Field Manager, it was his duty to forward it to Washington (43 C.F.R. 50.33, 1946 Supp.). The regulations under the 1920 Act provided that "no specific form of application is required" (43 C.F.R. 192.42, 1946 Supp.), and this provision was incorporated by reference into the regulations under the 1947 Act (43 C.F.R. 200.4, 1947 Supp.) The distinction between applications in the public domain and those for acquired land for which appellant Snyder argues so vehemently

* 43 CFR 200.1-200.10, 1947 Supplement: 200.1 authorizes leases "subject to the same conditions as contained in the mineral leasing laws of * * * February 25, 1920". 200.3 provides for the consent of the acquiring agency. 200.4 makes existing regulations applicable to leases of acquired lands, except as otherwise stated therein. 200.5 requires a separate statement as to (a) applicant's interest in mineral deposits and (b) a description of the property. No forms were provided and the general tenor of the regulations leaves the impression that existing forms could be used, plus the separate statement. (See Appendix hereto).

was practically unknown at that time. The argument is obviously made for the purpose of finding in the Interior Department a discretion that Congress did not give it. The question is actually moot in this case because the uncontroverted facts show that Dorrough filed his application for the forty (40) acres as land in the public domain and that the application was on the proper form and filed with the Field Manager at the proper place.

Although this question is, as we stated, moot, we think it may not be amiss to make a few comments concerning the use of the term by appellants. We would have no objection to a contention that an applicant must file a *proper* application, if by that term it is meant simply an application "conforming to statutory requirements". However, the contention of appellants is, in substance, that an application is proper, not necessarily because it conforms to the statutory requirements or even the regulations, but only if in the judgment of the Secretary of the Interior it is a proper application. Congress has established a specific statutory standard as to whom preference should be given, and the Secretary has no power to modify, alter or change that standard.

The statutory preference applies whether the land or rights are in the public domain or within acquired lands. This provision is a part of the mineral leasing laws, without distinction or specification as to the source of the right in the United States. In fact, the words *public domain* do not appear in the 1920 Act, the limitations of the application of the provision to land so described being entirely the result of the strict construction of the statute. The 1947 Act merely brought within the scope of the mineral leasing laws, other lands, which, by reason of such construction, had been considered outside of the scope thereof.

The excerpts from the legislative history quoted and referred to above, show beyond doubt the intent of Congress to create a uniform system for the disposition of oil and gas rights, regardless of source and unifying the

authority to make such leases in the Secretary of the Interior. The obvious purpose was to simplify the procedure and to standardize the methods of leasing and handling of applications. The explanation with respect to the bill shows that the Committee relied upon the development of procedures with respect to the 1920 Act by the Secretary of the Interior which were required to be applied likewise to lands covered by the 1947 Act "to the extent applicable". The only deviation was with respect to the need of the consent of the acquiring agency. In spite of this clear Congressional mandate to administer these two categories of mineral lands in the same way and under the same regulations, it is now seriously urged that an applicant for such leasing rights must specify in his application whether the lands are public domain or acquired, *at the peril of losing his statutory preference*, if he should be wrong. The division of these two classes of mineral lands which the Congress sought to eliminate by concentrating authority in the Secretary of the Interior is thus to be perpetuated through administrative fiat, apart from the statute. The statutory language is "the person first making application * * * who is qualified to hold the lease." There is no question here as to the qualification of the applicant and consequently, the only statutory standard is "the person first making application."

The language of the statute is clear enough. The Secretary would make it ambiguous and uncertain by inserting the word *proper* before the word *application*.

Appellants have contended that an application which is defective or improper does not earn a prior right to a lease over a subsequently filed *proper* application. This definition is in the terms of the result that is produced and does not furnish an objective standard by which a *proper* application is to be determined. Let us then analyze the examples that are given (Seaton brief, pp. 17, 18): (1) It is said that when the filing fee and advanced rental

are not paid, it is not a proper application. These items have nothing to do with the propriety of the application; they are merely conditions precedent to the filing. It is like when the Clerk of the Court refuses to accept a complaint because the filing fee is not paid; this does not mean that the complaint is defective. Another alleged defect under the same heading is when the application claims on its face more than the maximum number of acres allowed; this is a failure to comply with the statutory requirement. (2) Another alleged illustration was where a lease did not contain a metes and bounds description of the land to be leased. Obviously such an application is not sufficient to comply with the statute and is not an application at all within its terms. (3) It is said that a public domain application sent to Washington was not a proper application and was not considered as filed until received at the appropriate District Land Office. Here again the question is not the propriety of the application but whether the appropriate custodian accepted or rejected the tender for filing. In this connection, comparison might be made with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Witbeck v. Hardeman*, 51 F. 2d 450, 453, in which the Court refused to disqualify an application because of the failure to pay the filing fee but did disqualify it because it was not sworn to as required by the statute. (4) The fourth* classification is the one with which we are here concerned. It is said that an application to lease lands as acquired lands is not a proper application entitled to priority, if the lands turn out to be public lands. Such a ruling is arbitrary and unreasonable, particularly in view of the fact that under the statute an application for acquired lands must fulfill all the requirements of an application for public lands, plus one, namely, the consent of the acquiring agency. Therefore,

* Examples (5) through (7) obviously failed to comply with specific provisions of the statute or regulations and have no bearing on the issue before the Court.

such an application includes within its terms all of the requirements of an application for the leasing of lands in the public domain.

The ultimate decision and determination whether certain lands owned by the United States are in the public domain or constitute acquired lands may well constitute an involved question of fact and law. The applicant is not bound, at his peril, to make a final determination in this respect prior to the filing of the application. It is the duty of the Secretary to act, if the application presents a case within his authority. Moreover, he alone has complete access to all of the facts and records. The applicant is bound to know only the lands that he desires to lease. It is up to the Secretary to determine how the United States came into ownership of those lands and if the consent of any acquiring agency is necessary. If the Secretary's decision in this case is upheld, the only safe way for an applicant to proceed would be to make two applications simultaneously for the same land, one as public domain and the second as acquired land. It is submitted that such procedure would place an undue burden on both the applicant and the Secretary, and would be in direct conflict with the intent and purpose of Congress in passing the 1947 Act.

Let us consider the facts of this case in relation to the asserted requirement that an applicant know absolutely, at his peril, whether the land in question is public domain or acquired. It is said that the land in question was patented under the homestead laws to one Danielson in 1940 and reconveyed to the United States in 1942. Upon that state of facts, without anything more, the land would be acquired land although it was once a part of the public domain. It is now claimed that the mineral rights were in the public domain because there was a reservation of such rights in the original patent to Danielson. Under a specific provision of the 1920 Act such rights would be a part of the public domain. On the other hand, in Snyder's

letter of November 3, 1952, he states that "patentee filed a waiver of all oil and gas unto the United States of America under the Act of 7/17/14". If this statement were literally correct and the waiver was filed subsequent to the grant, then under the strict construction that has been given to the 1920 Act, these rights would be acquired rights, because public domain rights are only those which were originally in the United States and have never passed out of the United States at any time to any other person. Clearly, it is unreasonable and arbitrary to require an applicant to make a correct determination of the source of such lands and rights, at the time the application is filed, at the peril of losing his statutory preference.

The records from which a proper determination of the status of such lands and rights can be determined are available, in a practical way, only to the Secretary and his subordinates. To transfer this responsibility to the applicant would be to impose a heavy burden upon him, contrary to the Congressional purpose and intent. In fact, the question here was so confused and uncertain that on three separate occasions the subordinates of the Secretary made rulings that the rights in question were not in the public domain but were in acquired lands. The letter of W. H. Burnett, Regional Chief Adjudication, dated January 25, 1949 (J.A. 40a); the Manager's decision of October 23, 1952 (J.A. 50a); and the decision of the Chief, Branch of Minerals, dated October 29, 1951 (J.A. 44a) approving the lease to plaintiff, were all based upon a prior determination that the rights of the United States were in acquired lands. No human being could possibly know or be expected to know that the ultimate decision would be different from these three determinations by authorized subordinates of the Secretary and certainly, if these decisions were later determined to be wrong, the standing of the applicant should not be destroyed thereby. Such continuity of identical rulings was not the result of mere coincidence and must have had a substantial basis.

The position and contentions of the Secretary in this case remind one of the old distinction between actions at law and in equity, arising under the common law. Then, a lengthy proceeding in an equity case might result in the determination that complainant had an adequate remedy at law, although the remedy at law might by that time be lost. That was the outgrowth of the early days when the Chancellor in equity was a different person, sitting in a different tribunal, from the law judges. Even after law and equity courts were combined, it took considerable time before it became possible readily to transfer an action from one side to the other, with preservation of filing status. Here the Secretary seeks to preserve the old distinction which Congress sought to eliminate. When Congress passed the 1947 Act concentrating the authority in the Secretary of the Interior, the distinction between the two types of lands was, in effect, abolished with certain minor limitations, and an application for a lease, in whatever form, was to be treated as an application for such a lease as the Secretary could grant under the authorizing statutes.

As has been pointed out above, the question whether Dorough filed a proper application is actually moot in this case because of the concession by appellant Seaton and his counsel that the application constituted a sufficient legal basis for the issuance of a lease of rights in the public domain (J.A. 33a *et seq*). But by reason of the emphasis that appellants place upon this contention it has been thought advisable to analyze the problem for the benefit of the Court.

Two cases cited by appellants with reference to this subject do not support the claims made for them. In *West v. Work, supra*, the application was filed at a time when the Secretary had no authority to make the requested lease, and this Court properly held that the applicant acquired no rights thereby. The Supreme Court had held in a prior case that lands in Oklahoma which had

been declared by Congress to be agricultural lands, were not subject to the 1920 Act. By an amendment effective March 4, 1923, the Secretary was granted appropriate authority to lease these lands. This Court held simply that the alleged application filed on March 6, 1920, when the Secretary had no power or authority to make a lease of the designated acreage in Oklahoma, was a nullity at that time, and the amendment of March 4, 1923, did not apply retroactively to said application.

Phillips Petroleum Co. v. McKay, Civil Action No. 5024-53, decided by the United States District Court for the District of Columbia on June 17, 1955, is also relied upon by appellants. That case dealt with the construction of the lease to Phillips Petroleum Company in the light of existing statutes. Under the 1930 Act authorizing lease of oil and gas deposits under railroad rights-of-way, competitive bidding was required between the owner of the adjacent oil rights and the owner of the railroad right-of-way. Since there had been no effort to comply with this condition precedent in the statute, the District Court correctly held that the lease to Phillips Petroleum Company should not be construed as including mineral rights under the railroad right-of-way, even though such rights were not specifically excluded from the lease. The question there was one of construction of the lease. There is no similar question here, nor is there any contention that there has not been full compliance with all conditions precedent as set forth in the statute.

It is submitted that the above cases do not support the contentions and arguments of appellants herein.

4. THE STATUTORY PRIORITY OF APPELLEE'S ASSIGNOR WAS NOT AFFECTED BY HIS REQUEST THAT THE APPLICATION BE FORWARDED TO WASHINGTON

During the argument at the trial of this case, the District Court pointed out that in its opinion the important legal question was the effect of Dorrough's request that his

application be treated as an application for an oil and gas lease of acquired lands (Tr. p. 114; J.A. 41a). There is nothing in the statute or regulations upon this particular point, except 43 C.F.R. 50.33 (1946 Supp.) which directs the Manager to "forward all matters requiring action by the Director or the Secretary." The Solicitor ruled that Dorough's acquiescence in this action was "equivalent to a rejection of his public land application" (J.A. 14a). Therefore, he concluded that Dorough lost his preference right by failure to appeal, relying upon the simultaneous decision in *Charles D. Edmonson*, 61 I.D. 355.

These conclusions are contrary to any of the facts known in the case. The regulations required that an applicant be given thirty days notice of a rejection and an opportunity to appeal. Dorough was not given such an opportunity. Nor was Dorough told that he would thereby lose his priority and preference as a public domain applicant. The letter that he wrote shows his firm intention to retain the "filing time and date priority" of his application (J.A. 41a). There was nothing that he did that could be construed factually as an abandonment or intentional withdrawal of his application. All that Dorough did was to say to the Interior Department substantially this; "If you say that this is acquired land, all right, treat it as an acquired land application". Certainly, there was no intention to waive nor waiver in fact of his statutory priority right, and if such a waiver is to be inferred, it must be based upon the statute and regulations and not upon the acts of Dorough. The briefs of appellants tend to leave the impression that the treatment of Dorough's application as one for acquired lands had the effect under the regulations of destroying his statutory priority as an application for a lease of land in the public domain. Actually, there are no such regulations. It must be emphasized again that at the time Dorough's application was filed no form had been prescribed for applications with respect to acquired lands. The regulations under the 1920 Act (43 C.F.R.

192.42, 1946 Supp.) provided that "no specific form of application is required," and certainly no form was prescribed under the 1947 Act. The regulations for acquired lands required certain additional information and that the application be filed in Washington, practically nothing more. The argument that there was a vast difference between the two kinds of applications is contrary to the actual facts, and this is demonstrated in the case itself by the fact that the Field Manager was willing to transfer the application to Washington as one for acquired land, without any additional information and without any change in the form of the application. The differences in the handling of the two applications grew solely out of the fact that different agencies controlled the surface. The regulations made none of the fine legal distinctions as to what constitutes a proper application, that appellants now claim.

Hypothetical situations are usually not very helpful in an argument but under appellants' theory, if this land had turned out to be acquired land and Snyder had filed a later acquired land application, he might likewise have asserted that he had filed the first proper application because appellants' application was on the form provided for applications in the public domain and did not contain the additional statement required by 43 C.F.R. 200.5 (1947 Supp.). And it might also be argued that the acts of subordinates of the Secretary did not constitute a waiver of the provisions of the regulations. In short, there is no end of situations where vested rights might be destroyed if the Secretary's position on this point is sustained.

This Court should affirm the findings of the Court below that the transfer of Dorrough's application to Washington had no effect on his priority or preference rights and that the actual issuance of the lease constituted a final step assuring him of his right in the lands described therein.

5. THE DECISION OF THE SECRETARY OVERRULED OR WAS CONTRARY TO PRIOR DECISIONS, AND EVEN IF VALID, SHOULD NOT HAVE BEEN APPLIED RETROACTIVELY

The Solicitor's opinion in this case, 61 I.D. 367 (J.A. 8a-16a) dated August 10, 1954, seems to have been based primarily on rulings on three points, namely: (1) Although Dorough's application "appears to have been a proper application for a noncompetitive public domain oil and gas lease and a lease could have been issued on it", when he authorized that the application be forwarded to Washington, it became, in effect, an application for acquired lands (J.A. 12a); (2) "Since Dorough had sought as acquired land, land available for leasing only as public domain, his application was not a proper one and failed to earn him a preference right to a public land oil and gas lease" (J.A. 13a); and (3) Dorough's application could not be reinstated as for land in the public domain. It is the purpose of this portion of the brief to discuss these rulings in relation to the existing rulings and practices of the Bureau of Land Management. During the month of August, 1954, the Solicitor of the Interior Department made a number of rulings that drastically changed and revised the practices of the Department and the interpretation and construction of applicable regulations. These rulings had the effect of creating new standards and requirements which certainly should not have been applied retroactively to the detriment of applicants and lessees conforming to the old practice. In certain respects the new rulings applied to specific cases but the old Departmental practices continued to prevail in others. The net result is that the Solicitor has attempted to reserve power to decide in an individual case whether an application was *proper* and entitled to preference, or whether any regulatory requirement may in the circumstances be nonsubstantial and waived.

Upon the first point, the decision in *R. L. Grady*, A-26903 (not published), decided August 31, 1954, is illustrative. In that case Grady had filed an application for

acquired land at 3:15 P. M. on August 25, 1950. Mrs. Leitch had filed an application at 9:30 A. M. on the same day. A lease was granted to Grady effective January 1, 1952, and another lease was granted to Mrs. Leitch effective November 1, 1952. The Bureau of Land Management held that Mrs. Leitch was the first qualified applicant and cancelled Grady's lease. Among the points raised by Grady were that the application of Mrs. Leitch was on the form of a lease of public lands under the 1920 Act, which was subsequently amended to show it to be an application under the 1947 Act, and that her application was not a proper one until the amendment was made. The Solicitor held that the regulations did not "require that the application cite the statute under which it is filed or state that the land applied for is acquired land." He further held that the amendment constituted a non-essential addition which would not affect the priority date. Actually, Mrs. Leitch filed an amended application on a later date but the Solicitor held that it did not "constitute a withdrawal of the existing application even though accompanied by a request to replace the original papers with papers containing the additional information". The Solicitor held for Mrs. Leitch. It is difficult to reconcile this decision with that in the present case, particularly since it was made only a few weeks later.

With respect to the second point the Solicitor relied on *E. A. Wight*, A-25408 (July 16, 1948) 60 I.D. 215, and *G. G. Stanford*, A-26765 (November 9, 1953) 61 I.D. 232. Neither case involved the question of cancellation of an existing lease. The question in each was as to which was the first applicant.

In the *Wight* case, applicant had filed an application for land in the public domain but had sent his application to Washington on April 18, 1947. Several months passed before the application was returned to him with instructions that it should have been filed in the District office.

In the meantime, Brickel had filed in the District office on June 29, 1947. Wight's complaint was that the Washington office wrongfully withheld the application for more than sixty (60) days before returning it to him with this information. The Solicitor held that the Washington office was justified in withholding the application for that period of time, because applicant had claimed that the land was subject to Section 402 of the Reorganization Plan No. 3 of 1946 and this error was not readily apparent on the face of the application. It seems clear from this opinion, if the error had been entirely or primarily that of the Washington office, a different conclusion would have been reached.

In the *Stanford* case there were two ambiguous applications which were construed in the light of answers to questions as to interests in other land in the State, and it was determined that the lands were "reasonably identifiable" in the Koch application but not in the earlier Stanford application. When two years after the lease was issued to Koch, Stanford sought to reinstate his original application as land in the public domain, the refusal to do so was in line with other cases, where procedural irregularities were held not to furnish a basis for cancellation of a lease actually issued to a later applicant. The reasoning and conclusion of the Solicitor in this case strongly support the position of appellee herein. In arriving at his conclusion, the Solicitor cited and relied upon *Jane E. Brenton*, A-26759 (July 30, 1953) as follows:

"In that case, as against conflicting offers filed during a period when the original offers were being erroneously processed (as covering acquired lands) the original offers were allowed to prevail, the Department holding that proper offers having been filed in the proper land office, their erroneous transmittal to the Washington office for processing as acquired lands had no significance in determining which qualified persons were the first making applications for leases, as provided in the Mineral Leasing Act, *supra*."

There the Solicitor held that the transmittal to Washington "had no significance", while in the present instance the Solicitor held that it destroyed appellee's priority under the statute.

It is submitted that the cases relied upon in the Solicitor's opinion upon this point do not constitute valid precedents for his ruling in this case, and his conclusion that appellee's assignor thereby lost his priority and right to a lease was an arbitrary ruling made to justify the desired result.

Prior to August 10, 1954, the date of the decision in this case, the rule had prevailed that a senior application rejected on an invalid ground but not appealed from could be reinstated. This rule was set forth in the case of *Bettie H. Reid*, A-26330, 61 I.D. 1, decided February 4, 1952, and the subsequent case of *John F. Deeds-Jeff Hawk*, A-26287, decided June 26, 1952. Mrs. Reid had the first application and it was wrongfully rejected. Nearly four years later Miss Pipkin applied for the same rights and on May 14, 1951, the manager took administrative action to accomplish the issuance of a lease to Miss Pipkin as of June 1, 1951. On May 28, 1951, Mrs. Reid filed a petition for reinstatement of her application erroneously rejected. The Solicitor held that there was a *mandatory duty* to issue the lease to Mrs. Reid and that: "The failure to do so cannot be justified in view of the plain language of the statutory provision governing the issuance of noncompetitive oil and gas leases." The basis of his ruling was set forth in language that is directly applicable to the facts in this case:

"There was no reason why Mrs. Reid, upon being informed by the manager of the office that this area was withdrawn and, hence, was unavailable for oil and gas leasing, should have questioned the accuracy of the manager's statement concerning the status of the land, since this was a factual matter within the peculiar competency of the manager as the official in charge of the records showing such status."

The *Reid* case set forth the established practice until *Charles D. Edmonson*, 61 I.D. 355, decided August 10, 1954, the same day as the decision in this case. In that case the rule was promulgated that "an applicant for a noncompetitive oil and gas lease whose application is rejected and who fails to appeal within the time allowed for appeal will lose his preference right to a lease as against subsequent qualified applicants". In promulgating this new rule the Solicitor said that the ruling laid down in the *Reid* case and in the *John F. Deeds* case "will no longer be followed". It is this new rule of law which was applied on the same day to appellee herein, without notice or warning, and with respect to rights that had come into being six years earlier. In effect, the Solicitor was saying "If your case had been decided yesterday, I could have decided in your favor, but now the rule has been changed." Even if the rule has a sound basis, its retroactive application in this matter is arbitrary and confiscatory and deprives appellee of its rights without due process of law.

Actually, the extension of the *Edmonson* rule to the present case goes much further, because the application was not actually rejected and appellee's assignor really had no opportunity to appeal. In all three of the cases considered in *Edmonson* there was an actual rejection of the application. Here there was only acquiescence in the transmission of the application to Washington, as the result of a mutual mistake of fact.

One of the reasons given as supporting the decision in *Edmonson* was that it would correct "uncertainty of lease titles. One who has applied for apparently available land and received a lease may awake one day to find that he has lost his lease to a prior applicant about whose existence he did not even know." Nevertheless, here the *Edmonson* case is cited as authority to cancel and destroy appellee's lease. The true doctrine should be that a lease, once issued,

should not be subject to cancellation for failure to comply with internal departmental procedures. This is the doctrine of the patent cases which will be discussed later.

Shortly before the above cases were decided, on August 3, 1954, the Solicitor decided the case of *S. J. Hooper*, A-26979, A-26996, 61 I.D. 346. The case holds that the departmental regulation 43 C.F.R. 200.5, requiring that the application contain a separate statement as to certain details, was a mandatory requirement but that Hooper's application filed prior to an amendment effective November 16, 1951, would not be affected until he was given an opportunity to correct his application. Furthermore, on October 28, 1954, 61 I.D. 350, a supplemental opinion was issued in which it was found that the Bureau had processed many acquired land applications and issued leases based upon such applications without requiring compliance with 43 C.F.R. 200.5. Accordingly, it was thought unfair to penalize applicants and possibly lessees, for failing to comply with this requirement. Furthermore, it was there stated:

"When regulations have been amended in the past making mandatory the performance by applicants of an act which was not previously required, the Department has allowed, without loss of priority, additional time for complying with the new requirement to persons who filed applications, without knowledge of the new requirement, immediately after the new requirement became effective. * * * It is believed that where, as here, a regulation has been administered over a period of time as not mandatory, a decision holding such administration to be erroneous should provide for the correction of the error with as little prejudice as possible to persons relying on the erroneous administrative construction."

Accordingly, the Assistant Secretary of the Interior directed that such applicants should be allowed additional time to supplement their applications without loss of priority. On November 4, 1954, a general release was

issued allowing until December 1, 1954, for the correction of lease applications for acquired lands. This extension applied to applications filed prior to August 31, 1954.

The same principles of administrative fairness and justice set forth in the supplemental *Hooper* decision should prevent any retroactive application of the new rulings made August 10, 1954, from depriving appellee of its lease. Any other course would be arbitrary, confiscatory and contrary to law.

5. THE PRINCIPLES OF THE LAND PATENT CASES REQUIRING A JUDICIAL PROCEEDING TO CANCEL A CONVEYANCE, APPLY TO THIS OIL LEASE, AND *McKAY v. WAHLENMAIER* IS NOT TO THE CONTRARY

At page 31 of appellant Seaton's brief it appears to be conceded that if the principles of the land patent cases apply, a judicial proceeding would be necessary before appellee's lease could be cancelled. However, it is contended that a lease is different in that continued administrative control is required.

The principles underlying the land patent cases are clearly set forth in *Moore v. Robbins*, 96 U.S. 530, 533, 24 L. Ed. 848, 850, where the question was very similar to the one here presented. There the Secretary "directed the patent to Moore to be recalled, and one to issue to Bunn." A unanimous Supreme Court held that the issuance of a patent was the final administrative step, beyond recall by the Secretary. However, the Court added:

"If fraud, mistake, error or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals; and if the government is the party injured, this is the proper course."

The principle of the above case has been reaffirmed in many other cases, including decisions of this Court in *United States v. Carter*, 21 D.C. 591, which holds that a

Commissioner may not reopen a controversy after a patent has been issued; and *Lane v. Watts*, 41 App. D.C. 149, affirmed in 234 U.S. 525, 58 L. Ed. 1440, in which an injunction was granted against the Secretary of the Interior to prevent him from reentering upon public lands, granted in accordance with statutory authority, in spite of certain irregularities in the exercise of such authority and in his determination.

In *Noble v. Union River Logging R. Co.*, 147 U.S. 164, 174, 37 L. Ed. 123, 127, the general principle that an administrative determination and grant may not be later revoked and cancelled, was restated and reaffirmed. That case likewise arose in the District of Columbia. It was an action to enjoin the Secretary of the Interior from annulling the action of his predecessor who had approved certain maps setting out plaintiff's application for a right-of-way over public lands. For the purpose of that statute, such approval amounted to a grant of a right-of-way. The Supreme Court there pointed out that in order for the Land Department to nullify a patent its issuance must be not merely irregular "but absolutely void". The Court then added:

"Upon the other hand, if the patent be for lands which the Land Department had authority to convey, but it was imposed upon, or was induced by false representations to issue a patent, the finding of the department upon such facts cannot be collaterally impeached, and the patent can only be avoided by proceedings taken for that purpose."

In *Burke v. Southern P. R. Co.*, 234 U.S. 669, 710, 58 L. Ed. 1527, 1556, the Supreme Court clearly indicated the controlling principle that mere irregularities in the issuance of a patent did not constitute grounds to set it aside, but that "a direct suit for its annulment" was available if fraud was present. The effect of these decisions is to deny the existence of an administrative power to set aside

a land patent, which may be assailed only by direct attack in a judicial proceeding, upon a showing of fraud, imposition or other recognized ground for equitable relief.

In *Witbeck v. Hardeman*, 51 F. 2d 450, 452, the Circuit Court of Appeals for the Fifth Circuit held that the principles of law previously determined in many decided cases applicable to the issuance of patents of public land, were applicable also to the issuance of leases under the Mineral Leasing Act of February 25, 1920. It there said:

"Under the Leasing Act the land of the United States is not to be conveyed by patent, but leased, so that the proprietary interest of the United States in the land never ceases. Nevertheless, the lease is the final action of the Land Department in disposing of the land, and in this respect is analogous to a patent. The general powers of the Land Department in administering this law are just such as are exercised in administering other land laws, and exactly the same necessities exist for judicial review of frauds on or in the Department, or mistakes of law, or excesses of the limits of authority, as arose in reference to the grant of patents, and similar remedies ought to apply."

The reasoning of the Court may be of interest here. The Court did not find any discretion in the Secretary, his function being to apply the law as Congress had declared it:

"But here the law makes the choice, and the question is whether the Secretary by mistaking the law has given the contract to some one other than the one chosen and intended by the United States, speaking through the Congress. The Court but succeeds to the Secretary in identifying that choice."

Hardeman's application for a permit was refused by the Secretary because it was not under oath and was not accompanied by the necessary fees. The fees were paid upon notification and the Court refused to approve the denial on that ground. However, the statute required that the application be under oath and the Court held that failure to con-

form to the statute was fatal to Hardeman's claim. It is to be noted that the Court refused to recognize the regulatory requirements that the application be accompanied by the fee as a sufficient basis for invalidating the application.

Call v. Richfield Oil Corp., 101 F. Supp. 972, has been cited as authority supporting cancellation by the Secretary. An examination of that case will show that no decision was actually rendered by the Court on that issue and the case was remanded to the Secretary for further administrative proceeding. In that case the Director of the Bureau of Land Management had cancelled plaintiff's lease on the theory that it had been issued through inadvertence and mistake because there was a prior application by one Gillbergh. Plaintiff contended that his lease could be cancelled only as a result of a judicial proceeding, relying on 30 U.S.C. § 188. The Court seemed to recognize the correctness of this contention, if the lease was valid. However, there plaintiff was not the first applicant in point of time and the Court expressed the tentative view that under the statute "prior applicants obtained prior rights". It is respectfully suggested that this decision supports appellee more than it does appellants.

The principal reliance of appellant Seaton is upon the decision of this Court in *McKay v. Wahlenmaier*, 96 U.S. App. D.C. 313, 226 F. 2d 35. That was an action brought by an unsuccessful applicant for an oil and gas lease wherein the successful applicant was chosen by lot. This Court affirmed the finding of the District Court that Culbertson, the successful applicant, had taken unfair advantage by the filing of multiple applications and had thus increased his chances for a successful drawing. The Secretary apparently recognized the unfair advantage taken by Culbertson but a majority of the Court said that he was under a "misapprehension of his own power and duty to cancel a lease obtained as this one was."

The case came before the Court on the issue whether Culbertson was a qualified applicant and whether his application should have been rejected. There was no issue before the Court with respect to the right of the Secretary to cancel his lease, only the unsuccessful applicant being before the Court. Nevertheless, the following appears in footnote No. 11:

"We think the Secretary unduly restricted his own power of cancellation. He has the right to cancel a lease improvidently issued to a disqualified applicant, to the prejudice of the rights of others, whether or not there is involved a violation of some provision of the statute or of a regulation. This is particularly true where fraud, deception or concealment caused the lease to be issued."

It is to be noted that the Court refers to "fraud, deception or concealment" as grounds for cancellation and its discussion of the facts in the case shows that these elements were present. The decision in that case does not support the claim of appellant Seaton that it is "dispositive of the issue in this case". This Court did not hold in that case that there was an absolute power of cancellation in the Secretary for mere irregularities in the issuance of a lease and the facts before the Court show that the Secretary's action was based on false applications. This is the construction that the Secretary of the Interior and its Solicitor have placed upon the decision. In *John C. DeArmas, Jr., P. A. McKenna*, A-27232, decided March 19, 1956, the following comment was made concerning the *Wahlenmaier* decision:

"Furthermore, in the *Wahlenmaier* case the court found that the person to whom the lease was issued had unfairly and secretly attempted to gain an advantage over other persons in the issuance of the lease, a factual situation which is not present here.

"Consequently, the *Wahlenmaier* case is distinguishable from the supplemental *Hooper* decision and

affords no reason for the Secretary to depart from his ruling in the latter."

We think it clear that this Court in the *Wahlenmaier* case did not hold that there was any general reserved power of cancellation in the Secretary.

The reasoning of the Supreme Court that led it to conclude that a land patent, once issued, was final and conclusive as to the rights of the patentee, apply with even greater force to oil leases. Vast sums of money are often spent in the development of such leases and they should not be construed as subject to any reserved power of cancellation by the Secretary, except to the extent as written in the lease itself. A lease, once issued, constitutes a substantial property right of which its owner cannot and should not be deprived except through judicial recourse.

It is respectfully submitted that the decision of this Court in *McKay v. Wahlenmaier*, *supra*, should not be construed as holding that the principles of the land patent cases are not applicable to oil leases. Certainly, this Court has made it clear that in order to cancel for a violation of the terms of a lease, a judicial proceeding is absolutely necessary, *Bell Oil & Gas Co. v. Wilbur*, 60 App. D.C. 256, 257, 50 F. 2d 1070.

That was an action in which plaintiff sought to enjoin the Secretary from attempting to cancel an oil lease. This Court held under the provisions of Section 31 that plaintiff was not entitled to an injunction because there was an adequate remedy at law, in that the Secretary could not cancel the lease except in a judicial proceeding:

"The Secretary, under the terms of the act, has no power by his own fiat to cancel these leases. He is required to go into a District Court of the United States to accomplish that result by a proceeding in equity."

* * * * *

"Plaintiff cannot be deprived of its property in the leases except by due process of law, and a court of equity, having jurisdiction of the proceeding, has jurisdiction to enter a decree which will protect the rights of all parties involved;"

The above case shows clearly that plaintiff has a property right in the lease that cannot be cancelled or destroyed except by due process of law.

The rights and powers of the Government as a lessor of public mineral lands are no greater than those of any other proprietor, if statutory requirements have been satisfied. This was clearly set forth in the well-considered District Court opinion of District Judge Beaumont (Southern District, California, Central Division) in *United States v. General Petroleum Corporation*, 73 F. Supp. 225, 234, affirmed 184 F. 2d 802, as follows:

"In resolving the foregoing issues it must be remembered that the government's role is taken to be no different from that of any private lessor or proprietor, for while the Kettleman Hills lands involved are public mineral lands, and as such until their disposition are under the supervision and control of Congress, the government as to such lands acts in a proprietary capacity, and treats with them in the same way as does the private landowner. Regardless of the type of lease Congress might authorize, a lease executed in accordance with what it *has* authorized becomes a private, contractual matter and is to be interpreted according to the general rules of law respecting contracts between individuals. And regardless of what Congress has authorized, unless the authorized provision is mandatory, it may not be 'read in' if the Secretary omitted to include it."

The Secretary has recognized limitations in his authority to cancel a lease of mineral lands. In the appeal of *L. N. Hagood*, A-25912, 60 I.D. 462 decided February 7, 1951, an application for a non-competitive oil and gas lease was suspended because the tract was included in the

prior application of the Richfield Oil Corporation. Later the Richfield lease was relinquished and a lease was made with Hagood. Not long thereafter, Howard filed an application for the same tract and objected to Hagood's lease on the ground that Hagood's application should have been rejected rather than suspended and that Howard's application was the first one filed after the tract became available. The Secretary held that the handling of the Hagood application in this way "violated an established administrative practice in the Department, but that the issuance of the lease to Mr. Hagood did not violate any provision of the Mineral Leasing Act." Therefore, he ruled that there was no legal basis for cancelling the Hagood lease. The opinion contains the following statement of principles:

"The Department's power to cancel noncompetitive oil and gas leases after their issuance is limited. One proper basis for the cancellation of a lease is that the requirements of the statute governing the issuance of such leases have not been satisfied. *Russell Hunter Reay v. Gertrude H. Lackie*, A-24670 (August 12, 1947). A lease may also be cancelled if the lessee fails to comply with the provisions of the statute, the applicable regulations, or the terms of the lease, and such default continues after notice has been given (43 C.F.R. 192.161). However, none of these grounds for cancellation seems to be available in the present case."

To like effect is the Manager's decision in *Melvin A. Brown*, Montana 010981, 08136, decided April 20, 1955, where there was a failure to note a relinquishment on the tract book as required by the regulations.

Appellant Snyder relies (brief p. 34) on cases such as *Russell Hunter Reay v. Gertrude H. Lackie*, A-24670, 60 I.D. 29, as showing the exercise of an administrative power of cancellation. That was a simple case whereby the original application of Lackie was overlooked and a lease was issued to Reay, a subsequent applicant. There was

no question or doubt as to the facts. The Secretary held that the issuance of the lease to Reay "violated the statutory preference which Lackie had", and accordingly, was not binding and must be cancelled. This is the type of case in which the Secretary has heretofore cancelled leases, namely, when the statutory requirement clearly had not been followed. To like effect was *Transco Gas & Oil Corp.*, 61 I.D. 85. *Halvor Holbeck*, A-27167, A-27182 (November 14, 1955), relied upon by appellants, actually supports appellee because there the Secretary refused to cancel a lease, apparently void because of lack of ownership in the United States, pending a final decision of the North Dakota courts as to title.

We think it is clear that under the facts of record there was no administrative power of cancellation in the Secretary to cancel appellee's lease.

7. AS A LEASE OF OIL RIGHTS IN A PRODUCING FIELD, COURT PROCEEDINGS WERE MANDATORY TO EFFECT CANCELLATION

Joint Appendix 66a is a plat showing the location of the oil lease and its proximity to other producing wells. J.A. 62a is the affidavit of T. O. H. Mattson, Division Petroleum Engineer for appellee, showing the dates that six oil wells of The Texas Company in the adjacent field were spotted, the date of completion of the drilling, and the date of production. On August 10 1954, the date of the decision of the Solicitor of the Interior Department, on behalf of the Secretary (J.A. 7a), oil was being produced on at least one well and drilling had been completed on another, with actual production four days later. It is the position of appellee that this fact of actual production in the field imposed upon the Secretary an absolute bar to administrative cancellation, regardless of what may be his power or authority in other circumstances. U. S. Code, Title 30, Section 188, provides for forfeiture and cancellation of a lease "by an appropriate proceeding in

the United States district court", with the further proviso that the lease may be cancelled by the Secretary upon thirty days' notice for failure to comply with any of its provisions "unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas". This area was known to contain such deposits at the time of the purported cancellation, and the record shows that it was subsequently officially recognized as a part of the Charlson Field (J.A. 70a).

The present regulations provide in 43 C.F.R. § 192.161(b) as follows:

"Leases known to contain valuable deposits of oil and gas may be cancelled only by judicial proceedings in the manner provided in Sections 27 and 31 of the Act."

Part 192 of the regulations is entitled "Oil and Gas Leases" but apparently relates primarily to leases in the public domain. Part 200, "Mineral Deposits in Acquired Lands" has no specific provision relating to cancellation.

Section 8 of appellee's lease provides as follows:

"SEC. 8. *Proceedings in case of default.*—If the lessee shall not comply with any of the provisions of the act or the regulations thereunder or make default in the performance or observance of any of the terms, covenants, and stipulations hereof and such default shall continue for a period of 30 days after service of written notice thereof by the lessor, the lease may be *canceled by the Secretary of the Interior in accordance with the act*, and all materials, tools, machinery, appliances, structures, equipment, and wells shall thereupon become the property of the lessor, except that if said lease covers lands known to contain valuable deposits of oil or gas, the lease may be *canceled only by judicial proceedings in accordance with the act*; but this provision shall not be construed to prevent the exercise by the lessor of any legal or equitable remedy which the lessor might otherwise have. A waiver of any particular cause of forfeiture shall

not prevent the cancellation and forfeiture of this lease for any other cause of forfeiture, or for the same cause occurring at any other time." (emphasis supplied) (Plaintiff's Exhibit 10).

This lease carries forward the provisions of the statute and regulations requiring "judicial proceedings where the lease is known to contain valuable deposits of oil or gas". The lease further reserves to the lessor the right to exercise "any legal or equitable remedy which the lessor might otherwise have". The above-quoted section is the only provision of the lease whereby the Secretary has any power of cancellation. It is true that the Secretary did not act under this section, because there was no default under any of the terms of the lease. In other words, the lease contains no provision giving the Secretary the right to cancel in the circumstances of this case. The established principles of construction of written documents would seem to exclude the existence of any implied power of cancellation, when the actual grant of such power in the instrument itself is inapplicable.

In view of the known fact of production in this field, and in view of the provisions of the statute, regulations and the terms of the lease, the Secretary was prohibited from proceeding to cancel the lease, except through an appropriate judicial proceeding.

CONCLUSION

It is respectfully submitted that the evidence shows that appellee's assignor was the first qualified applicant for the lease of the forty (40) acres in controversy and that the lease dated December 1, 1951, was properly and validly issued to appellee; that appellee's lease could not be cancelled administratively by the Secretary because of non-compliance with internal Departmental procedures, in the absence of a showing of fraud, deceit, imposition or actual lack of power to lease; and finally, since this lease

was known to be in a producing field, under specific provisions of the statute and the regulations, it could not be cancelled except through an appropriate judicial proceeding. In the circumstances, it is respectfully submitted that the judgment below should be affirmed.

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March 26, 1957

APPENDIX

REGULATIONS OF THE SECRETARY OF THE INTERIOR. IN
ADDITION TO THOSE SET FORTH IN THE APPENDIX TO
THE BRIEF OF APPELLANT SEATON

Leasing Under the Mineral Leasing Act for Acquired Lands

Authority: §§ 200.1 to 200.10, inclusive, issued under sec. 10, 61 Stat. 915, 30 U.S.C. 351-359.

Source: §§ 200.1 to 200.10, inclusive, contained in Circular 1668, Director, Bureau of Land Management, approved by the Assistant Secretary of the Interior, Dec. 15, 1947, 12 F.R. 8678.

43 C.F.R. 1947 Supp.

§ 200.1 *Purpose and authority.* The Mineral Leasing Act for Acquired Land, enacted on August 7, 1947 (61 Stat. 913, 30 U.S.C. 351-359), and hereinafter referred to in this section, and in §§ 200.2 through 200.10, as "the act", authorizes the Secretary of the Interior to issue permits and leases for deposits of oil, gas, oil shale, coal, phosphate, sodium and potassium in lands acquired by the United States, including such lands in Alaska, subject to the same conditions as contained in the mineral leasing laws of October 20, 1914 (38 Stat. 741; 48 U.S.C. sec. 432), February 25, 1920 (41 Stat. 437; 30 U.S.C. sec. 181), February 7, 1927 (44 Stat. 1057; 30 U.S.C. sec. 281), and in all laws which amend or supplement these mineral leasing laws. The act also authorizes the issuance of permits and leases for sulphur deposits in such acquired lands, wherever situated, subject to all other conditions contained in the act of April 17, 1926 (44 Stat. 301; 30 U.S.C. sec. 271).

The authority conferred upon the Secretary by the act, supersedes the authority upon him by section 402 of Reorganization Plan No. 3, effective July 16, 1946 (3 C.F.R., Cum. Supp., ch. IV), as to the above-enumerated

minerals, except as to leases or permits outstanding on August 7, 1947.

* * * * *

43 C.F.R. 1947 Supp.

§ 200.3 *Consent of agency having jurisdiction of the land.* Leases or permits may be issued only with the consent of the head or other official of the executive department, independent establishment or instrumentality having jurisdiction over the lands containing the deposits, or holding a mortgage or deed of trust secured by such lands, and subject to such conditions as that official may prescribe to insure adequate utilization of the lands for the primary purpose for which they were acquired or are being administered.

43 C.F.R. 1947 Supp.

§ 200.4 *Other regulations applicable.* Except as otherwise specifically provided in §§ 200.1 to 200.36, inclusive, the regulations prescribed under the mineral leasing laws and contained in Parts 70, 71, and 191 to 198, inclusive, of this chapter, shall govern the disposal and development of minerals under the act to the extent that they are not inconsistent with the provisions of the act. Any lease or permit issued under the act shall state that it is subject to the terms and provisions of the act.

* * * * *

43 C.F.R. 1947 Supp.

§ 200.8 *Preference right of oil and gas lease applicants.* Qualified applicants for oil and gas leases embracing lands subject to the act, whose applications were pending on the effective date of the act, shall have a preference right over others for an oil and gas lease under the act, provided that on the date when the application was filed the lands were not within the known geologic structure of a producing oil or gas field.

Prior Regulations

43 C.F.R. 1946 Supp.

§ 192.6 *Boundaries of known geologic structures and productive limits of producing oil and gas fields and deposits.* The Director of the Geological Survey will determine the boundaries of the known geologic structures of producing oil or gas fields and, where necessary to effectuate the purposes of the act, the productive limits of producing oil or gas deposits as such limits existed on August 8, 1946. Maps or diagrams showing the boundaries of known geologic structures of producing oil or gas fields and of the productive limits of producing oil or gas deposits will be placed on file in the appropriate district land office, and office of the oil and gas supervisor. Any lessee or his operator may apply to have a determination made as to whether or not the land upon which he intends to drill a well is inside or outside the productive limits of a producing oil or gas deposit. The application should be accompanied by all available geologic data which in his opinion have a bearing on the matter.

* * * * *

NONCOMPETITIVE LEASES

43 C.F.R. 1946 Supp.

§ 192.42 *Applications for noncompetitive leases.* Applications for noncompetitive leases may be filed in the proper district land office, or, for lands or deposits in States in which there is no district land office, in the Bureau of Land Management, addressed to the Director of the Bureau of Land Management. All applications must be accompanied by the filing fee prescribed in § 191.11 of this chapter, and at least one-half of the first year's rental. Any application not accompanied by the minimum fee and rental payment will be rejected. No specific form of application is required and no blanks will be furnished.

An application executed by an attorney in fact must be accompanied by the power of attorney and the applicant's own statement as to his citizenship and acreage holdings. Proof of the authority of the officer who makes application on behalf of a corporation must be furnished.

The application must contain in substance the following:

(a) The applicant's name and address.

(b) A statement as to citizenship: In case of an individual, whether native-born or naturalized and, if naturalized, date of naturalization, court in which naturalized, and number of certificate, if known; if a woman, whether she is married or single; if married, the date of her marriage and the citizenship of her husband; if a corporation, by certified copy of the articles of incorporation and a showing as to residence and citizenship of the stockholders; if 20 percent or more of the stock of any class is owned or controlled by any one stockholder, a separate showing of his citizenship and holdings. In case any of the stock of the corporation is held by aliens, a showing is required giving, to the extent reasonably ascertainable, the name, the country to which each owes allegiance and the amount of stock held by each.

(c) A statement of the interests, direct and indirect, held by the applicant in oil and gas leases, and applications therefor on public lands in the same State, identifying by serial number the records wherein such interests may be found.

(d) Description of the lands for which a lease is desired, describing the lands by legal subdivisions or, if unsurveyed, by metes and bounds description connected with a corner of the public surveys by courses and distances.

(e) A statement that the applicant is ready upon demand to pay the remainder of the rental and to furnish such bond or bonds as may be required under the lease or regulations.

Where any required information or statements are already on file with the Department, the showing required by the regulations of this part may to that extent be made by appropriate reference to the information or statements already on file.

* * * * *

43 C.F.R. 1946 Supp.

§ 192.44 *Form of lease.* Noncompetitive leases will be executed on Form 4-213 and the rentals and royalties payable thereunder will be set forth in Schedule A affixed thereto and made a part thereof.

Present Regulations

43 C.F.R.

§ 192.161 *Cancellation and termination of lease.* (a) Any lease issued after July 29, 1954, or any lease which is extended after that date pursuant to § 192.120, on which there is no well capable of producing oil or gas in paying quantities shall automatically terminate by operation of law if the lessee fails to pay the rental on or before the anniversary date of such lease. However, if the time for payment falls upon any day in which the proper office to receive payment is not open, payment received on the next official working day shall be deemed to be timely. The termination of the lease for failure to pay the rental must be noted on the tract book, or, for acquired lands, on the official records relating thereto, of the appropriate land office. Until such notation is made, the lands included in such lease are not subject to, nor available for, leasing. Offers to lease filed prior to such notation will confer no rights in the offeror and will be rejected.

(b) Whenever the lessee fails otherwise to comply with any of the provisions of the act, of the regulations issued thereunder, or of the lease, such lease may be cancelled by the Secretary of the Interior if not known to contain valuable deposits of oil or gas after notice to lessee in ac-

cordance with section 31 of the act, if default continues for the period prescribed in that section after service of notice thereof. Any lessee of a lease which issued prior to July 29, 1954, may, at any time prior to the anniversary date of such lease and the accrual of rental, elect to subject his lease to the automatic termination provisions of this section by notifying, in writing, the manager of the appropriate land office to that effect.

(c) Leases known to contain valuable deposits of oil or gas may be cancelled only by judicial proceedings in the manner provided in sections 27 and 31 of the act.

(Circ. 1904, 20 F.R. 1778, Mar. 24, 1955)

SUPPLEMENTAL MEMORANDUM FOR APPELLEE
UPON REHEARING

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,636

FRED A. SEATON, Individually and as Secretary of the
Interior, *Appellant*

v.

THE TEXAS COMPANY, *Appellee*

No. 13,637

JOHN SNYDER, *Appellant*

v.

THE TEXAS COMPANY, *Appellee*

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January 3, 1958

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13636

FRED A. SEATON, Individually and as Secretary of the
Interior, *Appellant*

v.

THE TEXAS COMPANY, *Appellee*

No. 13637

JOHN SNYDER, *Appellant*

v.

THE TEXAS COMPANY, *Appellee*

**SUPPLEMENTAL MEMORANDUM FOR APPELLEE
UPON REHEARING**

This memorandum has been prepared to comply with the informal indication of the Court that it is interested in the question whether the cancellation of Dorrough's lease was illegal, in that it was not initially accomplished through judicial rather than administrative proceedings.

It is the opinion and contention of appellee that the purported cancellation was illegal. This was the position that appellee took in its brief and which was accepted by the Court in its opinion. Certainly, it is beyond question that

a lessee of mineral lands acquires a property right in them, and this right comes into being when the lease is issued. If the lessee can be deprived of its lease by further administrative action, then it will no longer be a property right but a mere license, subject to the whims and changes in opinion of the Secretary. As this Court so clearly said, the rights of the parties "cannot be so molded initially by administrative corrective action as to be subject only to the limited judicial scrutiny applicable where an administrator acts within his sphere of discretion." The deprivation of a property right, as the Secretary attempted in this case, must be subject to judicial review, under normal judicial standards with respect to such act. Accordingly, the conclusion is plain that once a lease is issued, further action with respect to it is beyond the administrative process and is subject to normal judicial scrutiny.

The fact that the purported cancellation of the lease by the Secretary was illegal without a judicial proceeding, should not necessarily result in a failure to arrive at a decision on the merits in this proceeding. A court of equity has within its power and processes sufficient flexibility to treat this proceeding as if it had been brought by the Secretary for judicial cancellation and arrive at a conclusion whether the record is sufficient to justify cancellation on normal judicial grounds. We believe that the Court was justified in its former holding because of limitation in the stipulation, but that limitation now seems to have been waived by the parties. Appellee offered to make such a waiver on Page 2 of its Answer to appellants' Petition for Rehearing, and the Memorandum filed on behalf of both appellants which urges the Court to reach a conclusion on the merits, would seem to be a like waiver on the part of appellants. In these circumstances, we do not see that there is any obstacle to prevent the Court from reaching a conclusion on the merits on this record.

If the Court decides this case on the merits, the Court should treat the case as a judicial proceeding in which the

Secretary is seeking the cancellation of appellee's oil lease. The record should be reviewed as to the presence or lack of judicial grounds for cancellation, and not as a mere review of an administrative decision, because the Secretary does not have administrative power to cancel the lease. Hence, the burden of proof should be on the Secretary to justify the purported cancellation on established judicial grounds.

It is well-settled that mere irregularity or nonconformance with procedural requirements does not constitute a basis for cancellation of a land patent,* *Moore v. Robbins*, 96 U. S. 530, 533, 24 L. ed. 848, 850; *Noble v. Union River Logging R. Co.*, 147 U. S. 164, 174, 37 L. ed. 123, 127; *Burke v. Southern P. R. Co.*, 234 U. S. 669, 710, 58 L. ed. 1527, 1556; and the Secretary has followed a like rule in connection with oil leases. *L. N. Hagood*, A-25912, 60 I. D. 465 (1951); *Russell Hunter Reay v. Gertrude N. Lackie*, A-24670, 60 I. D. 29 (1947).

The memorandum filed on behalf of appellants presents their argument, as if the issue herein were identical with two other cases pending before the Court, namely, *Barash* (No. 14069) and *McKenna* (No. 14095). In neither case was there a purported cancellation of a lease by the Secretary. On the contrary, in each case dissatisfied applicants seek to have the Court compel the Secretary to cancel leases granted to others. We submit that neither case presents the issue in which the Court has indicated its interest because in neither case has there been any administrative cancellation of a lease by the Secretary. However, it is our intention to discuss these cases in relation to *McKay v. Wahlenmaier*, 96 U. S. App. D. C. 313, 226 F. 2d 35.

* *Witbeck v. Hardeman*, 51 F. 2d 450, 453 (5th Cir.) indicates that the same doctrine is applicable to oil leases. Upon review on *certiorari*, the Supreme Court affirmed, 286 U.S. 444, 76 L. ed. 1217, but without discussion of this principle of law.

The Secretary argues that his power of cancellation cannot vary with the facts of the particular case or the kind of error involved. We agree that this is true but our reason is that the Secretary has no administrative power of cancellation. His only power is similar to that of any individual who may assert that a lease is void. He may not legally cancel the lease by unilateral action on his part, if he had color of authority and power to execute it. Compare *Noble v. Union River Logging R. Co.*, *supra*.

In the *Barash* case, the Secretary determined, possibly in an informal manner, that certain lands were in a non-geologic structure and on a competitive basis made leases to two applicants for portions of the lands. Appellant claims that the Secretary failed to make a suitable determination of this fact and, therefore, his application for a non-competitive lease should have been granted. In his brief in the *Barash* case (p. 18), the Secretary points out that one lessee paid to the Secretary \$25,000. for its lease and contends that in the absence of the lessee, as a party thereto, the courts of the District of Columbia do not have jurisdiction to require the cancellation of the lease.

In the *McKenna* case, the lease was awarded to De Armas, the first applicant in point of time. Appellant McKenna filed a later application which conformed to a requirement of the regulations with respect to listing of pending applications. He claims that the application of De Armas did not comply with the listing requirement and that, therefore, McKenna was the first applicant whose application conformed to the statute and regulations. The Secretary ruled, under the doctrine of the second *Hooper* decision, that the regulatory requirement as to listing of other applications had not been enforced and that the failure of the application of De Armas to comply with said regulation did not disqualify him from receiving the lease. In his brief in that case, the Secretary argues that mere

irregularities in an application may be cured and it was not "illegal" for the Secretary to permit the curing of such a defect (Brief, p. 15). In the Summary of Argument in his brief, the Secretary states his position in the following words (p. 8): "There is no question but that appellee De Armas is in fact the first to file and that he meets all statutory requirements. Hence, as a matter of principle and fairness, he is entitled to prevail." This language is applicable literally to the position of appellee, The Texas Company, in the case at bar.

The conclusions above suggested would not be inconsistent with the *Wahlenmaier* decision. In that case, the Court's treatment of the issue was not the mere review of an administrative decision, but whether the award of the lease ought to be set aside upon recognized legal grounds. The Court found that imposition and fraud were present, which are recognized grounds for setting aside a transaction. As stated above, upon this analysis of the *Wahlenmaier* decision there is nothing therein that would be inconsistent with the ruling in this case that the purported cancellation of the lease was invalid because it was not accomplished in a judicial proceeding.

In making the above statement, we wish to make it clear that we do not agree with certain aspects of the *Wahlenmaier* decision and that of course we are aware that the Court is here concerned with its conclusion, not in this case alone, but in the three related cases. We feel it to be our duty to point out the portions of that decision with which we do not agree.

We think first, and fundamentally, that the Court lacked jurisdiction to order the cancellation of the Culbertson lease, without Culbertson being a party to the case and having an opportunity to defend. It seems to us that the most that the Court could do in that case would be to direct the Secretary to institute an action to set aside the Culbert-

son lease in a court having personal jurisdiction over Culbertson or over the property involved. Upon full consideration we do not regard the proceedings in the District of Columbia in the *Wahlenmaier* case as having given the District of Columbia courts jurisdiction over either the person of the lessee or the *res* itself.

In the second place, the effect of the decision is to change the statutory standard, which required only that the award be made to the person who first makes application and who is qualified under the Act. The decision has the effect of transferring the word *qualified* to the application, thus making the rights of the applicant depend upon the form and content of the application. The statute gives the right to the *first applicant*, provided only that he is qualified to hold the lease. It is this aspect of the decision which tends to create controversy as to the propriety and sufficiency of an application. Congress did not impose this requirement.

And finally, as a corollary to the preceding point, we believe that the failure to include in the application certain information that was required by the regulations would not be ground for cancellation, unless the information would have the effect of disqualifying the holder as a lessee under the statute. In other words, we agree with the opinion only to the extent that fraud and imposition were found to be the basis of its holding.

The conclusions which we here suggest would be consistent with the land patent cases (cited in our original brief and in the Court's original opinion), and would tend to reduce rather than increase the number of cases that would have to be handled by the Department of Justice. Under the *Wahlenmaier* decision, any dissatisfied applicant has the color of a case if he can show that the successful applicant's application was defective in some respect. The *Wahlenmaier* case has the effect of making the Secretary's

regulations an inflexible straightjacket* from which an applicant may not deviate at his peril and concerning which the Secretary is without power to forgive and condone. The construction of the Secretary's regulations should be a matter within his administrative discretion and not subject to judicial review, unless arbitrary or capricious. If the *Wahlenmaier* decision is applied in the manner that we have suggested in this memorandum, we believe that the true field of the Secretary's administrative authority would be preserved, litigation on behalf of the dissatisfied applicants would be reduced and the rights of lessees to protect their established property interest through judicial proceedings would remain unimpaired.

The above discussion concerning the limitations of the application of the *Wahlenmaier* decision should not, in our opinion, affect the jurisdiction and power of the Court to come to a decision on the merits in this case. All of the parties are before it and all seek a final determination. Certainly this Court, as a court of equity, can consider that as having been done which should have been done, and treat this proceeding, from a procedural and burden of proof standpoint, as if it had been an action by the Secretary to cancel the lease of appellee.

The Secretary makes very little argument with respect to the merits of the claim of the Texas Company versus that of Snyder, and the record is clear beyond doubt that appellee's assignor Dorough was the first qualified applicant. His sole argument is that the lease to the Texas Company referred to the wrong act of Congress, and that as a result thereof, the rents would be distributed in a different manner. Certainly, such a defect in form fur-

* *Ibid*, p. 321:

"The Secretary is bound by his own regulation so long as it remains in effect. He is also bound, we think, to treat alike all violators of his regulation. He may not justify, simply by saying the violation is unimportant, his departure in a single case from an otherwise consistent policy of rejecting applications which do not conform to the regulation."

nishes no basis for this Court to approve the cancellation of the property right of the Texas Company in its lease. The defect in form should be promptly cured, by an appropriate amendment of the lease of the Texas Company, or by an exchange of its lease for one in proper form. The Congressional directive to award the lease to the first qualified applicant should be followed by the Court without undue emphasis upon the form in which the directive is carried out.

For the reasons set forth, it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

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January 3, 1958

**BRIEF FOR FRED A. SEATON, SECRETARY OF
THE INTERIOR, APPELLANT**

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13636

FRED A. SEATON, SECRETARY OF THE INTERIOR, APPELLANT

v.

THE TEXAS COMPANY, A CORPORATION, APPELLEE

**APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA**

PERRY W. MORTON,
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*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

FEB 11 1957

Joseph W. Stewart

QUESTION PRESENTED

An oil and gas lease was mistakenly issued on land of the United States as "acquired land" when the property was, in fact, "public land." The Secretary of the Interior cancelled that lease on the ground that, although both types of land are subject to lease, an applicant for a lease, to establish and retain his priority over other applicants, has the responsibility of applying for and insisting upon a lease under the distinct statute and regulations applicable to the proper category of land because they differ substantially. The question is:

Whether that cancellation by the Secretary was so "arbitrary, capricious, and without authority of law" as to require reversal by the district court.

(1)

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13636

FRED A. SEATON, SECRETARY OF THE INTERIOR, APPELLANT

v.

THE TEXAS COMPANY, A CORPORATION, APPELLEE

*APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA*

BRIEF FOR FRED A. SEATON, SECRETARY OF THE INTERIOR,
APPELLANT

OPINION BELOW

The opinion of the district court is not reported. It is set out at pp. 69a-79a of the Joint Appendix.

JURISDICTION

The Secretary of the Interior issued an oil and gas lease on public lands of the United States, which by assignment, came to appellee. That lease was subsequently cancelled in favor of a lease issued on the same lands to another. This suit was instituted by appellee against the Secretary of the Interior for a mandatory injunction to compel him to set aside the cancellation (Jt. App. 1a-6a). Jurisdiction of the district court was asserted to be under 5 U. S. C. Sec. 1009 (Jt. App. 1a). John Snyder, the party whose lease prevailed under the ruling by the Secretary, intervened to defend in the action. Judgment was entered granting the relief requested by appellee on August 16, 1956 (Jt. App. 77a), and the judgment was modified in a respect not relevant here on September

7, 1956 (Jt. App. 78a). Notice of appeal was filed by the Secretary on October 2, 1956, and by the Intervenor on October 3, 1956.¹ The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1291.

STATEMENT OF THE CASE

This action was instituted by appellee, The Texas Company, against the Secretary of the Interior for relief in the nature of mandamus to compel him to set aside his cancellation of an oil and gas lease held by appellee on 40 acres of lands of the United States in McKenzie County, North Dakota. The grounds for the relief sought were that, in cancelling the lease, the Secretary had "acted arbitrarily and capriciously, abused his discretion, violated plaintiff's constitutional rights, exceeded his jurisdiction, authorization and limitation, and was without statutory right." John Snyder, who held another oil and gas lease issued by the Secretary on the same lands and who, therefore, benefited by cancellation of appellee's competing lease, intervened in the action to protect his interests. The relevant facts are as follows:

On April 19, 1948, Thomas G. Dorough (appellee's assignor)² filed with the district land office at Bismarck, North Dakota, an application for a noncompetitive oil and gas lease on approximately 2,000 acres of land (Jt. App. 35a). The application recited that it was made pursuant to the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, as amended, 30 U. S. C. Secs. 181, *et seq.* (Jt. App. 35a).³ The 2,000 acres applied for covered approximately 32 separate parcels of land

¹ This appeal by the Secretary of the Interior (No. 13,636) and the appeal by John Snyder, Intervenor (No. 13,637), were consolidated by order of this Court dated December 27, 1956, "for the purposes of filing a single joint appendix and for argument. Appellants and appellee may file consolidated briefs as they deem it desirable."

² Frequently throughout this brief, for the sake of clarity or brevity, the rights and interests of Dorough are referred to without expressly adding appellee, The Texas Company, as his successor-in-interest. It is intended in all such instances that the statement or contention apply equally to The Texas Company.

³ This Act of 1920 authorizes the leasing of public domain land.

Other lands of the United States (acquired lands) are authorized to be leased by the Mineral Leasing Act for Acquired Lands of August 7, 1947, 61 Stat. 913, 30 U. S. C. Secs. 351, *et seq.*

in nine different sections, including the NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 7 (Township 153 N., Range 95 W., 5th Principal Meridian, McKenzie County, North Dakota), which is the 40-acre tract involved here.

The application was given a serial number (Bismarck 025004) and held in the local office for processing (Jt. App. 9a, 35a). In that processing, "Status Sheets" were prepared showing the status (availability for leasing, etc.) of each tract described in the application. The Status Sheet relating to the 40-acre tract involved here (NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 7), submitted on October 21, 1948, showed that the oil and gas deposits were reserved to the United States from any agricultural entry or purchase by the Act of July 17, 1914, 38 Stat. 509, 30 U. S. C. Sec. 121 (Jt. App. 36a-37a).

On January 19, 1949, Dorough wrote to the Bureau of Land Management office in Billings, Montana, as follows⁴ (Jt. App. 39a):

Since filing the above numbered oil and gas lease application, I have learned that applications for acquired lands should be filed direct to Washington, D. C. Therefore, if any part of this application is considered acquired land, please accept this letter as formal notice that it is my desire that the matter be forwarded to your proper land office in order that an oil and gas lease can be issued.

The Regional Chief of Adjudication at Billings, by reply dated January 25, 1949, informed Dorough that of the 2,000 acres included in Dorough's application only 200 acres were public domain lands (as opposed to acquired lands). He then stated (Jt. App. 40a):

In view of the fact that the above land is the only land that may be included in a lease under the leasing act of February 25, 1920, it is suggested that you file a new application covering the balance of the land. Such application should be filed direct in the Bureau of Land Management office in Washington, D. C. Your appli-

⁴ The Bismarck land office was discontinued (Jt. App. 9a) on July 30, 1948, pursuant to Executive Order 9977, July 17, 1948 (13 F. R. 4033).

cation should clearly show that it is an application for acquired land.

In describing the 200 acres that were subject to the 1920 Act he mistakenly did not classify the oil and gas deposits in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 7, as public domain.

Dorough replied on February 3, 1949, as follows (Jt. App. 41a):

In view of the fact that only 200 acres of the lands desired proved to have the status of vacant public lands, it is my desire that the entire application be forwarded to the Bureau of Land Management, Washington, D. C., with a request that it be treated as an application for an oil and gas lease on acquired lands, thus retaining its filing time and date priority.

Enclosed herewith please find a separate application on the following described lands, in connection with other lands. [Here followed a description of the 200 acres in the original application which he had been advised were public lands. The description did not include the NE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 7.]

On the following day, the Regional Chief of Adjudication forwarded three applications by Dorough, including Bismarck 025004, to the Director of the Bureau of Land Management in Washington, D. C., together with a memorandum in which he stated (Jt. App. 42a):

I transmit herewith the following listed case files:

Bismarck 024999 Thomas G. Dorough

Bismarck 025002 Thomas G. Dorough

Bismarck 025004 Thomas G. Dorough

Each of these case files has attached to it a letter from Mr. Dorough showing that he wants the application to be considered as for acquired land only.

With the same mail this office received supplemental applications by Mr. Dorough under 025000 and 025003, including in those applications the public domain land that was included in 024999, 025002 and 025004.

Accordingly, it is suggested you delete from 024999 the NW $\frac{1}{4}$ sec. 3, T. 153 N., R. 95 W., and from 025002 the SW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 15, T. 151 N., R. 95 W., and from

025004 the SW $\frac{1}{4}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$ sec 5, NW $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$, sec. 8, T. 153 N., R. 95 W., 5th P. M. and that the applications be considered as to the balance of the land as being for acquired land.

We have closed the cases as to these three serials.

On September 25, 1950, the Regional Chief of Adjudication at Billings, Montana, sent to Dorough a Voucher for Refunds with return of his advance rental payment of \$546 on his original public land application (Bismarck 025004). The voucher contained the notation "Application rejected" (Jt. App. 43a).

The Washington office assigned acquired land serial numbers to the three applications. Application Bismarck 025004 became BLM-A 016898. As to the latter, a decision was rendered on October 29, 1951, by the Chief, Branch of Minerals, Division of Adjudication, Washington, D. C., wherein the application was rejected as to one tract because it was "public domain land and not acquired land" and as to two tracts because they "are privately owned."⁵ It was not observed that the NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 7, was also public domain as to its oil and gas deposits so that the decision approved the application for an acquired lands lease of the remaining 1,669.94 acres which included that parcel (Jt. App. 44a).

Accordingly, on December 1, 1951, a lease was issued to Dorough "under, pursuant, and subject to the terms and provisions of the Act of August 7, 1947 (61 Stat. 913)" for the 1,669.94 acres, which included the NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 7 (Jt. App. 45a).⁶ Dorough assigned his lease to The Texas Company, appellee here, on June 1, 1952.

⁵ No appeal was taken from this decision nor from the earlier decision which refused his original application as to the tract involved here.

⁶ Subsequently, in checking the accounts as to this lease, a discrepancy was discovered relative to the "previously paid \$546" (Jt. App. 44a). The Billings office advised the Washington office on April 23, 1952, as follows (Jt. App. 47a): "In checking with the Land Office on Serial BLM 025004, it was found that the case which was cross-referenced with BLM-A 016898 was closed and advance rental refunded by the Division of Adjudication. For your information, attached is copy of letter stating that the case was closed, together with copy of refund voucher." Accordingly, by decision of September 23, 1952, Dorough was advised that the decision of October 29, 1951, granting his lease application was in error to the extent of crediting him with \$546.00 previously paid, because that payment "was

Meanwhile, on May 14, 1951 (before Dorrough's lease was issued), John Snyder filed an application with the Bureau of Land Management in Washington, D. C., which was the correct office at that time, for an oil and gas lease on 239.67 acres of land, embracing NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 7, "pursuant and subject to the terms and provisions of the Act of February 25, 1920," relating to public domain lands (Jt. App. 49a). This offer was transmitted to the Billings office for adjudication. The offer was rejected as to the NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 7, by decision of the Manager of the Billings Land Office, dated October 23, 1952, on the mistaken ground that the tract had been "patented without an oil and gas reservation to the United States * * *". The name of the present owners of the oil and gas rights may be found in the county records" (Jt. App. 50a). The offer was also rejected as to some of the other lands on the same ground and on the ground of conflict with prior offers. A lease, effective November 1, 1952, was issued for the remaining lands in the offer (Jt. App. 53a).

Snyder appealed on November 3, 1952, from the rejection of his application as to the NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 7 (Jt. App. 51a). He contended that the tract had been patented with a reservation of the oil and gas to the United States so that such deposits had remained public lands of the United States. The status of the tract was thereupon checked in the public land records from which it was ascertained that, as Snyder contended, the land had been patented with an oil and gas reservation.⁷ Accordingly, by decision of March 18, 1953, the Man-

refunded the applicant in September 1950 at the time the application under serial number 025004 was closed out on the records of the local land office and transferred to this office where it was assigned new serial number BLM-A 016898" (Jt. App. 48a). He was allowed 30 days within which to pay in that sum.

⁷ The tract was entered by Selmer K. Danielson on March 26, 1934, under provisions of the Homestead Act (43 U. S. C. Sec. 161, *et seq.*). On April 11, 1940, a patent was issued to Danielson in which the oil and gas deposits were reserved to the United States pursuant to the Acts of June 22, 1910, and July 17, 1914, respectively (30 U. S. C. Secs. 81, *et seq.*, and 121, *et seq.*). On January 2, 1942, Danielson reconveyed the tract to the United States (Jt. App. 58a-60a). Thus, although title to the surface of the land and to non-reserved minerals has been reacquired by the United States, title to the oil and gas has always remained in the United States. Such reserved deposits are specifically made subject to leasing under the Mineral

ager revoked his earlier decision against Snyder as to this tract (Jt. App. 52a) and, on April 24, 1953, Snyder's lease of November 1, 1952, was amended to include the NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 7 (Jt. App. 53a).

Nine months later, on January 22, 1954, Snyder wrote to the Director of the Bureau of Land Management in Washington, as follows (Jt. App. 54a):

On May 11, 1951, under the Act of February 25, 1940 (41 Stat. 437, 30 U. S. C. Sec. 181), I filed for lands covering the above description. On November 1, 1952, I was issued an Oil and Gas Lease pursuant to the Mineral Leasing Act above stated for this land. This lease was executed in the Montana District Land Office in Billings, Montana.

On December 1, 1951, Thomas G. Dorough was issued a BLM-A Lease No. 016898, said lease being pursuant to the Act of August 7, 1947 (61 Stat. 913). The records show that this BLM-A Lease has been issued in error insofar as above described land is concerned, and in order to clear up any discrepancy in the title to my lease, I request that you cancel lease BLM-A 016898 as it effects the above described land.

The reason that the Lease BLM-A No. 016898 should not have included the above described land is that the oil and gas rights in and under said land were reserved to the United States in the Patent under the Act of 7-17-14 and therefore the oil and gas rights thereunder are public domain and not "acquired."

By decision of February 16, 1954, the Bureau of Land Management in Washington ruled (against Dorough and The Texas Company) that the tract "was erroneously included in oil and gas lease BLM-A 016898 and the lease is hereby canceled to that extent" (Jt. App. 55a).

Dorough then, on March 17, 1954, filed a petition for reinstatement of his original application (Bismarck 025004) as an application for a public lands lease on this tract (Jt. App. 67a), and Dorough and The Texas Company appealed to the Secre-

Leasing Act of February 25, 1920, as public domain lands of the United States. 30 U. S. C. Sec. 182, *infra*, p. 34.

tary of the Interior from the decision cancelling their lease. On August 10, 1954, the Solicitor of the Department of the Interior, acting under a delegation of authority from the Secretary of the Interior, affirmed the ruling of the Bureau of Land Management cancelling the lease and denied the petition for reinstatement (Jt. App. 7a-16a).

This suit was then instituted by The Texas Company against the Secretary. On March 8, 1956, John Snyder intervened as a defendant (Jt. App. 22a). Motions by the Secretary and by Snyder for summary judgment and a motion by Snyder to enjoin The Texas Company "from producing during the pendency of the present suit the three off-set wells through which plaintiff is draining oil and gas from intervenor's leasehold" were denied.

Thereafter, following a hearing on evidence consisting of the departmental record, the district court, by judgment entered on August 16, 1956, held that the cancellation of Dorough's lease "was arbitrary, capricious and without authority of law" (Jt. App. 77a-79a). The court set aside the cancellation, ordered the Secretary of the Interior "to restore said lease in full force and effect," ordered Intervenor, John Snyder, to surrender his lease for cancellation and "to file such instruments and make such entries in the records of McKenzie County, North Dakota, and elsewhere, that will make this judgment, in all respects final and conclusive as to the rights of the parties everywhere" (Jt. App. 79a).⁸

The court stated in its written opinion that, "The evidence is clear and convincing to this court that the plaintiff's 1948 application was the first application for the 40-acre tract. That fact is patent and cannot be controverted by legal technicalities regarding the propriety of the application. The failure of the applicant to receive a lease for the 40 acres from the

⁸ This judgment required that these acts be done by the Secretary and by Snyder within 30 days after entry of the judgment. But by amendment of the judgment on September 7, 1956, the time was enlarged to 60 days and, in the event of appeal, to 30 days after final disposition thereof (Jt. App. 78a, 79a). The portion of the judgment ordering Snyder to correct the county records had been agreed to by Snyder in the event that he did not prevail in the action. Appellee had made a like stipulation (Jt. App. 31a-32a).

District Land Office of North Dakota was due to a mutual mistake of the Manager of the Land Office and the applicant" (Jt. App. 74a-75a). These appeals followed.

STATUTES AND REGULATIONS

The relevant provisions of the Mineral Leasing Act of February 25, 1920, as amended, the Mineral Leasing Act for Acquired Lands of August 7, 1947, and the regulations issued under each of those statutes are set out in an Appendix to this brief, *infra*, pp. 33-43.

STATEMENT OF POINTS

1. The district court erred and exceeded its power in trying *de novo* and in overturning the decision by the Secretary of the Interior which cancelled appellee's oil and gas lease of the public lands involved.

2. The district court erred in ruling that appellee's assignor, Thomas G. Dorough, was the first person to file a proper application to lease the public lands involved in accordance with the requirements of the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, as amended, 30 U. S. C. Sec. 181, *et seq.*

3. The district court erred in ruling that John Snyder did not file the first proper application to lease the lands involved under the 1920 Act, *supra*.

4. The district court erred in ruling that Thomas G. Dorough's application to lease the public lands involved expressly as acquired lands, under the Mineral Leasing Act for Acquired Lands of August 7, 1947, 61 Stat. 913, 30 U. S. C. Sec. 351, *et seq.*, was valid.

5. The district court erred in ruling that Thomas G. Dorough's application, treated as a valid acquired lands application at Dorough's request, was also valid as to the included public domain land.

6. The district court erred in ruling that the lease issued to Thomas G. Dorough, assigned to appellee, on these public lands as acquired lands was authorized and valid.

7. The district court erred in refusing to rule that the Interior Department rejected Thomas G. Dorough's application for a public lands lease so that when he failed to appeal from

that rejection he lost his priority and all other rights under that application.

8. The district court erred in refusing to rule that Thomas G. Dorough withdrew his public lands application so that he lost his priority and all other rights under that application.

9. The district court erred in refusing to rule that the Secretary of the Interior required that separate applications be filed under the proper statute for leases of public domain and acquired lands, that this requirement was reasonable and lawful, that John Snyder who complied with this requirement was entitled to a lease in preference to Dorough who did not comply, and that the Secretary had the power and duty to cancel a lease issued to Dorough in violation of Snyder's preference right.

10. The district court erred in ruling that the Secretary of the Interior, in administering property of the United States according to statute and rules authorized by statute, was bound or estopped by assertions or agreements whose effect would contravene that law.

11. The district court erred in ordering the Secretary of the Interior "to restore * * * in full force and effect" the acquired lands lease (BLM-A 016898) issued to Thomas G. Dorough on public lands.

12. The district court erred in ruling that the Secretary of the Interior had authority to correct Thomas G. Dorough's lease, to reinstate his original application to lease, or in any other way to validate his application or lease so as to defeat the intervening statutory priority established by John Snyder.

13. The district court erred in ruling that the decision by the Secretary of the Interior was arbitrary, capricious and without authority in law.

14. The district court erred in entering judgment for appellee against the Secretary of the Interior and John Snyder.

SUMMARY OF ARGUMENT

A. The district court exceeded its proper function in this case. It tried *de novo* and overturned as "capricious" a decision by the Secretary of the Interior wherein he canceled an oil and gas lease previously issued by him on public lands.

The ground for the administrative decision was that the lease was void as unauthorized because the lessee was not the first person to file a proper application for it as required by statute and defined by departmental regulations. Congress entrusted that decision exclusively to the Secretary. It did not grant to the courts authority to make the decision *de novo*. There is no power in a court to substitute its judgment for that of the Secretary based on its opinion of the persuasiveness of the evidence and contentions. Given, as here, the power in the Secretary to make the decision—i. e., there being no law squarely commanding a contrary result—the courts have no function with respect to the decision so long as it is not truly capricious. An administrative ruling, whether right or wrong in the court's view, is not capricious where there is any reason to support it. In this case, there are sound and substantial reasons to support the Secretary's ruling:

1. The tract involved here is public land, not acquired land. Dorough, appellee's assignor, filed the first application to lease this tract as public land under the statute and regulations relating to public lands. That application was expressly "rejected" by the Interior Department. Dorough did not appeal. He withdrew that application and caused it to be sent from the District Land Office in North Dakota to the Bureau of Land Management in Washington, D. C., and there filed as an application to lease the tract as acquired land under the different statute and regulations governing such lands. Therefore, Dorough did not have on file any application to lease this tract as public lands when Snyder subsequently filed his public lands application. Accordingly, at that time, Dorough could not be considered to be the first applicant to lease these public lands.

2. The 1920 Act, requiring public lands to be leased to "the person first making application for the lease who is qualified under this Act," has consistently been interpreted by administrative rulings and court decisions to mean that the application itself must be in proper form to earn a priority. Plainly, an application to lease public lands as acquired lands, erroneous as to fact and as to the statute and regulations invoked, is not in proper form.

3. Congress authorized the leasing of public lands by the 1920 Act. That statute forbids the leasing of acquired lands under its provisions. Congress authorized the leasing of acquired lands by the 1947 Act. That statute does not permit the leasing of public lands under its provisions. The two statutes differ in substantial respects. Each statute authorized the Secretary to make rules and regulations to effectuate its purpose and the 1947 statute expressly authorizes him to make different rules to effectuate its different provisions and to meet its different administrative problems. The Secretary has thus duly issued regulations which require that applications to lease the two types of lands be filed in different places and contain different information. Of necessity, applications are processed by entirely different methods and personnel on different records and usually in different places. The regulations are plain and known to the public. The leases of course, must contain the different provisions dictated by the two statutes. The burden of establishing the right to lease under the proper statute is upon the applicant. This works no hardship on the applicant because the same public records showing the status of particular land is as available to all applicants as to the Secretary. Accordingly, an application to lease public lands as acquired lands cannot correctly be held to be a proper application and a lease issued under such an application, subject to provisions of the wrong law, cannot be valid.

B. Dorough's original application for a public lands lease was rejected by a departmental employee on the mistaken ground that the tract (the oil and gas deposits) was acquired land. Dorough lost his priority by failing to appeal from that rejection. He did not pursue his administrative remedy. The burden was on him to establish his rights. Moreover, the Secretary, in administering property of the United States according to statute and rules authorized by statute, cannot be bound or estopped by assertions or agreements whose effect would contravene that law.

C. The Secretary was under a mandatory duty to cancel Dorough's acquired lands lease because (1) it was issued in violation of the statutory priority prescribed by the 1920 Act,

(2) it was issued in violation of a consistent policy of rejecting applications which did not comply with the requirement that application be made under the proper statute, and (3) being a lease of public lands as acquired lands with provisions peculiar to acquired lands, it was void as unauthorized.

ARGUMENT

The District Court erred in overturning the decision of the Secretary of the Interior because his decision was both correct in law and sound in reason

Introductory: The concern of the Secretary of the Interior respecting the scope of judicial action in this case is great. He has made a decision authorized by Congress as to federal property entrusted by Congress exclusively to his management. If there is, in practice as well as in theory, an area of the governmental function wherein an executive officer may and should make the final decision, that area is the battle site of this contest.

An administrative decision which is plainly not "capricious" should not be branded "capricious" as a means of removing the issue from the domain of the Secretary to that of the courts. Such a characterization preserves, in terms, the limited function of the judiciary but, in fact, substitutes the opinion of the court for the judgment of the Secretary.

It may be that reasonable men would differ as to which of the contestants here should equitably have the lease. The Secretary is confronted with many hundreds of close contests annually.⁹ The losing party almost always has a case sufficiently tenable to present to the Secretary or even to the courts if it were their decision to make. But, beyond a challenge of the Secretary's authority to make the decision on the ground of express law, dictating a contrary result, the sole test of his decisions open to the courts is whether he acted arbitrarily and

⁹ The magnitude of the mineral leasing activity is shown by the fact that the Interior Department had 52,771 applications for noncompetitive oil and gas leases in process during the fiscal year ending June 30, 1955. It received 37,861 such applications during the year and closed out 38,676 by final decision. Noncompetitive leases outstanding at the close of the year numbered 99,076 and covered 74,707,824 acres of public domain and acquired land. *1955 Annual Report of the Secretary of the Interior*, pp. 277-279.

capriciously. And that, in turn, requires that there be no reasonable ground whatever to support his decision. It does not mean that, in the court's independent opinion, there is more persuasive reason for a contrary decision.

This is settled law. *United States v. Carmack*, 329 U. S. 230, 243-244, fn. 14 (1946); *Dakota Cent. Tel. Co. v. South Dakota*, 250 U. S. 163, 184 (1919); *Chapman v. Santa Fe Pacific Railroad Company*, 90 U. S. App. D. C. 34, 198 F. 2d 498, 502 (1952), certiorari denied, 343 U. S. 964; *Hammond v. Hull*, 76 U. S. App. D. C. 301, 131 F. 2d 23, 27 (1942), certiorari denied, 318 U. S. 777; *Wann v. Ickes*, 67 App. D. C. 291, 293, 92 F. 2d 215, 217 (1937). The courts have emphasized the particularly limited scope of permissible judicial intervention where the subject matter is action by the Department of the Interior in disposing of public lands. *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 324 (1903); *United States v. Jones*, 131 U. S. 1, 15 (1889); *Ickes v. Underwood*, 78 U. S. App. D. C. 395, 141 F. 2d 546, 548 (1944); *United States v. Ickes*, 69 App. D. C. 324, 101 F. 2d 248, 252-253 (1938).

The rule is essential. For example, as to the subject matter presented by the instant case, the courts do not have the information, experience, or staff to administer the vast and complex program of mineral leasing. They cannot adequately inquire into or appreciate how occasional, piecemeal decisions fit into or alter the weave of the entire fabric. Errors in procedure which to the non-expert may seem trivial and unique and hence are characterized as "technical" often present problems of major significance in the administration of such a program.¹⁰

Here, the Secretary has sought to decide the issue in a manner which, in his opinion, is both correct in itself and best provides an ascertainable, objective standard for future guidance. It will be shown that his decision is, at the very least, supported by sound and substantial reasons.

¹⁰ This would need no elaboration to a lawyer who has had to explain to a client why an appeal was lost because the notice was filed one day late.

A. The requirements of law as well as of impartial and efficient administration compelled the Secretary to lease to Snyder as the first qualified person to file a proper application

1. *Dorough did not have a public lands application on file when Snyder filed.*—The resolution of this contest depends upon whether the method by which Dorough made application earned him a priority under statute and regulation over applicant Snyder for a public lands lease. The material facts of the Dorough application are as follows: On April 19, 1948, he applied to the Bismarck, North Dakota, Land Office in a single application for an oil and gas lease on approximately 2,000 acres expressly as public lands (Jt. App. 35a). The fact is that, of the lands which he described, 80 percent were not public lands but were acquired lands, others were tracts of private lands, and only some 200 acres were public lands (Jt. App. 40a, 44a). He was advised that the application was ineffective except as to 200 acres (Jt. App. 40a.) Dorough acknowledged the error of this indiscriminate application by subsequently filing a new application for the 200 acres which he had been advised were the public lands involved and directing that the original application (less the 200 acres) be treated as for acquired lands and forwarded to Washington, D. C., the required office for filing applications on that type of land (Jt. App. 39a, 41a, 42a). He had been advised to file the "new application" for the acquired lands (Jt. App. 40a), but he elected to re-file on, and presumably limited his investigation, if any, to the smaller acreage. As will be shown later, the duty was on him, not on the Interior Department, to sort out the parcels according to their correct status.¹¹

¹¹ It is evident that Dorough had made no investigation of the status of the lands or of the Department's regulations before he filed his original application, for he stated in his letter of January 19, 1949, to the Land Office: "Since filing the above numbered oil and gas lease application, I have learned that applications for acquired lands should be filed direct to Washington, D. C. Therefore, if any part of this application is considered acquired land, please accept this letter as formal notice that it is my desire that the matter be forwarded to your proper land office in order that an oil and gas lease can be issued" (Jt. App. 39a).

The only construction which can be given to those acts by Dorough is that he *withdrew* his public lands application as to all lands included in his "acquired lands" application forwarded to Washington. Moreover, in the Department's letter to him of January 25, 1949 (Jt. App. 40a), there was a plain *rejection* of the original application as an offer to lease public lands, except for 200 acres, which Dorough could have challenged by appeal but he did not do so.¹² He took it as a rejection and asked that the application be accepted and processed as an acquired lands application (Jt. App. 41a, 42a). Both Dorough's withdrawal and the Department's rejection *terminated the application as an offer to lease public lands* to the extent of all lands embraced therein.¹³

Thus, as a matter of plain fact, Dorough did not have on file an application for a public land lease of NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 7, at the time Snyder filed his application to lease it as public land. It will now be shown that, for this reason as well as for independent reasons, the law prohibited the Secretary from ruling that Dorough had earned a priority to lease this public land as against Snyder.

2. *Applications are required to be in proper form to earn a priority.*—The statute authorizing the leasing of public lands requires the Secretary to lease to "the person first making application for the lease who is qualified under this Act." Act of February 25, 1920, 41 Stat. 437, as amended, August 8, 1946, 60 Stat. 950, 951, 30 U. S. C. Sec. 226, *infra*, p. 36. This Court defined such a person in *McKay v. Wahlenmaier*, 96 U. S. App. D. C. 313, 226 F. 2d 35, 39 (1955), to mean one whose "application was in such form and was filed in such circumstances" as to be proper under the statute and regulations. If his application was not in such form as to comply with the statute and regulations "the fact that his written request for the lease was the

¹² In addition to the rejection contained in the letter to him of January 25, 1949, he was notified by voucher dated September 25, 1950, that this application for a public land lease was "rejected" and his advance rental payment was refunded (Jt. App. 43a). The regional Land Office expressly "closed" the case as to that application (Jt. App. 42), and Dorough was advised of that action (Jt. App. 43a, 48a).

¹³ The fact that Dorough was given wrong information as to the status of the 40 acres involved here has no effect on this result. See, *infra*, p. 30.

first one * * * did not make him 'the person first making application' therefor. If he was not such 'person,' the lease was wrongfully issued to him and should have been canceled, even though he was otherwise qualified." See also *Call v. Richfield Oil Corp.*, 101 F. Supp. 972 (S. D. Cal. 1951).

The administrative construction of the foregoing provision of the Mineral Leasing Act of 1920 has consistently been that only a *proper* application may earn a priority. That construction was expressed in the decision in this case as follows (Jt. App. 12a):

If the Department determines that a tract of public land which is not within any known geological structure of a producing oil or gas field will be made available for oil and gas development, it is under a mandatory duty imposed by statute to lease it to the first qualified person *who files a proper application for it*, 30 U. S. C. 1952 ed., sec. 226; *Transco Gas & Oil Corporation et ano.*, A-26436 (December 8, 1952). A lease issued in disregard of this obligation of the Department must be regarded as having been issued without authority of law and, indeed, in contravention of the plain statutory mandate. Such an oil and gas lease is subject to cancellation. [Emphasis supplied.]

Examples of the application of that construction appear in the following administrative decisions: (1) An application to lease which was not accompanied by the full amount of the filing fee and advance rental was held to be not a proper application entitled to priority until the date when the balance of the amount required was paid. Another application which described more than the maximum number of acres was held not to be a proper application entitled to priority until the date when a withdrawal of excess acreage was filed by the applicant. *Transco Gas & Oil Corp. et ano.*, 61 I. D. 85 (1952). (2) An application to lease public lands did not contain a metes and bounds description of the land as required. Before the application was corrected, another person filed an application in proper form. It was held that no preference right over others was acquired by the filing of a defective application and a lease was issued to the subsequent applicant who had filed the

first proper application. *H. L. Rath et al.*, 60 I. D. 225 (1948). (3) An application submitted to the Washington office of the Bureau of Land Management instead of the appropriate district land office, as required by the regulations, was held not to be a proper application until it was forwarded to and filed in the district land office. *William H. Phipps*, A-25720 (August 19, 1949). (4) An application to lease lands as acquired lands, when in fact the lands described were public lands, was not a proper application to lease them as public lands under the Mineral Leasing Act of 1920. *E. A. Wight*, 60 I. D. 215 (1948); *G. G. Stanford*, 61 I. D. 232 (1953). (5) An application was denied priority which, contrary to regulations, sought lease of less than the 640-acre minimum where surrounding lands were open to leasing. *Annie Dell Wheatley*, 62 I. D. 292 (1954). (6) An application was denied priority which failed to submit a statement as to citizenship as required by regulation. *Pearl C. Baggett*, A-27188 (1955). (7) Applications were denied priority which were filed before cancellation of prior leases had been noted on the Department's records as required by regulation. *Van Arsdale*, 62 I. D. 475 (1955); *E. A. Vaughey*, 63 I. D. 85 (1956); *Ralph E. Fuchs*, A-27259 (1956).¹⁴

It will be shown in the next section of this brief, *infra*, pp. 20-29, that leases of public lands authorized by the 1920 Act are distinctly different from leases of acquired lands authorized by the 1947 Act and that the regulations of the Secretary under the two statutes require both the applicant and the Department to follow substantially different leasing forms and procedures. The administrative requirements duly imposed by the Secretary under these mineral leasing laws have the "force of law." They bind the Secretary as well as others so long as they are in effect. *Chapman v. Sheridan-Wyoming Coal Co.*, 338 U. S. 621, 629 (1950); *McKay v. Wahlenmaier*, 96 U. S. App. D. C. 313, 226 F. 2d 35 (1955).

¹⁴ The present decision reflects the principle not only in the Secretary's final decision but also in the decision of the Chief of the Branch of Minerals, dated October 29, 1951, which rejected Dorough's acquired lands application with respect to Lot 1, Sec. 4 (not here in issue) because that tract was in the public domain (Jt. App. 44a). Dorough did not appeal from that ruling.

In the present case, Dorough, who filed his original application on April 19, 1948, was the first applicant for a public lands lease on NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 7. As to the other lands described in the application which were public lands, the Secretary has ruled that the application was proper (Jt. App. 12a). Snyder filed his application for a public lands lease on that tract subsequently, on May 14, 1951 (Jt. App. 49a). Obviously, the Secretary would have ruled in favor of Dorough if the relative positions of the applicants had stabilized on those facts alone. But before Snyder filed, Dorough changed his application as to NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 7, from a public lands application to an acquired lands application. He thus changed his application as to the very subject matter of the lease, as defined by statute, so that the Secretary was compelled by the express terms of the statute, the departmental regulations, and court decisions to rule, as expressed in *Wahlenmaier*, that Dorough's application for a public land lease ceased to be "in such form" or filed "in such circumstances" as to make him "properly qualified as an applicant" with the result that "the lease was wrongfully issued to him and should have been canceled."¹⁵ The Secretary so ruled, spelling it out as follows (Jt. App. 13a):

* * * At this stage there was a conflict as to the disputed tract between a properly filed public domain application and a prior acquired land application. Since Dorough had sought as acquired land land available for leasing only as public domain, his application was not a proper one and failed to earn him a preference right to a public land oil and gas lease. *E. A. Wight*, A-25408 (July 16, 1956), *G. G. Stanford*, A-26765 (November 9, 1953). His application therefore should have been rejected as to NE $\frac{1}{4}$ SW $\frac{1}{4}$, sec. 7. *Id.*

Snyder's offer was filed under the proper statute and regulation and, as the first qualified applicant to file a proper application, he had earned a statutory pref-

¹⁵ The district court has ordered the Secretary to reinstate Dorough's lease. It is an acquired lands lease issued on public lands. We submit that neither the court nor the Secretary has authority to issue or maintain in force such a lease.

erence right to a public land oil and gas lease for the land in question. He cannot be deprived of his statutory preference by a lease issued to another person in disregard of it. * * *

3. *Public lands and acquired lands are different by congressional declaration and an application to lease public lands as acquired lands is not a proper application.*—The position of the appellee (assignee of Dorough), which the district court adopted, is that the Secretary of the Interior should not maintain a distinction between applications to lease public lands and acquired lands because both are federal lands and his Department administers both leasing programs. But that position (a) is contrary to the requirements of law as shown by the plain distinction established by Congress itself between the two types of lands and the leases thereon, and (b) usurps the judgment accorded exclusively to the Secretary by Congress in its grant to him of power to make different rules and regulations with respect to the leasing of each type of land.

The Mineral Leasing Act of February 25, 1920, 41 Stat. 437, as amended, 30 U. S. C. Sec. 181, *et seq.*, authorizes the leasing of public lands for oil and gas prospecting and development. It does not relate to or permit the leasing of acquired lands of the United States. 34 Op. A. G. 171 (1924); 40 Op. A. G. 9 (1941); *J. D. Mell*, 50 L. D. 308 (1924); 43 C. F. R. 191.2 (1946 Supp.). The amendment of August 8, 1946, 60 Stat. 950, 30 U. S. C. Sec. 181, *infra*, p. 33, is express in "excluding lands acquired" by the United States after the passage of the Mineral Leasing Act of 1920. Included as "public lands" under the 1920 Act are oil and gas deposits in public lands where, as in this case, the lands have been disposed of by the United States "reserving to the United States such deposits." 30 U. S. C. Sec. 182, *infra*, p. 34.

The Mineral Leasing Act for Acquired Lands of August 7, 1947, 61 Stat. 913, 30 U. S. C. Sec. 351, *et seq.*, authorizes the Secretary to lease acquired lands. It does not relate to and, in terms, provides that lands subject to the Mineral Leasing Act of 1920 are not subject to leasing under its provisions. 30 U. S. C. Secs 351, 355, *infra* p. 36, 38.

It is plain that Congress itself set up two categories of federal property open to leasing and intended and required that leases thereon be distinct and not interchangeable. It is true that the two statutes are similar. They both deal with the disposition of minerals owned by the United States. They are both administered by the Secretary of the Interior. The 1947 Act provides that acquired lands "may be leased by the Secretary under the same conditions as contained in the leasing provisions of the mineral leasing laws, subject to the provisions hereof" and that his "rules and regulations shall be the same as those prescribed under the mineral leasing laws to the extent that they are applicable." 30 U. S. C. Secs. 352, 359, *infra*, pp. 37, 39. But, as those excerpts actually emphasize, the distinction in the leases is plainly preserved. There is no authority given to lease public lands as acquired lands or vice versa. The power of the Interior Department to dispose of lands of the United States is peculiarly dependent upon and limited by the statutory authority conferred by Congress. *Utah Power and Light Company v. United States*, 243 U. S. 389, 404 (1917). Congress provided separate and different definitions of the properties in separate enactments.¹⁶ In contemplation of law, the subject matter in the two statutes is as different as distinct legal concepts of property can be.

Moreover, Congress required substantial differences in the contents of the leases and in the leasing procedures. Thus, the 1947 Act provides (30 U. S. C. Sec. 355, *infra*, p. 38): "All receipts derived from leases issued under the authority of this Act shall be paid into the same funds or accounts in the Treasury and shall be distributed in the same manner as prescribed for other receipts from the lands affected by the lease, the intention of this provision being that this Act shall not affect the distribution of receipts pursuant to legislation applicable to such lands * * *." The acquired lands in Dorrough's lease (016898) are under the supervision of the Soil Conservation Service of the Department of Agriculture and 7 U. S. C. Sec. 1012 provides that the distribution of proceeds from such lands shall be 25% to the county and 75% to the United States. On

¹⁶ Even the title "Mineral Leasing Act for Acquired Lands" was provided by Congress. 61 Stat. 913.

the other hand, the 1920 Act provides that all proceeds from leases issued under it shall be distributed 37½% to the state, 52½% to the Reclamation Fund and 10% to miscellaneous receipts in the Treasury.¹⁷ 30 U. S. C. Sec. 191. These statutory provisions clearly contemplate the issuance of separate leases and maintenance of separate records under the two Acts for the two types of lands involved.

Lands in the public domain ("public lands") are under the jurisdiction of the Department of the Interior itself. Accordingly, the 1920 Act made no provision for consulting other agencies with respect to whether such lands should be leased or the terms that should be included in leases issued under that Act. Acquired lands, however, are under the jurisdiction of the many agencies performing the functions for which the lands were acquired. Hence, the 1947 Act required that leases of such lands should be issued under that Act only "with the consent of the head of the" agency "having jurisdiction over the lands containing such deposit," and "subject to such conditions as that official may prescribe to insure the adequate utilization of the lands for the primary purposes for which they have been acquired or administered." 30 U. S. C. Sec 352, *infra*, p. 37. Thus, the contents of the leases issued under the two statutes differ substantially, by command of Congress, depending upon the conditions which the agency concerned may desire to include in an acquired lands lease to protect the primary use of the land.¹⁸

The interest of the United States in public domain land is always a present, undivided interest; whereas the interest of the United States in acquired lands is often a fractional or future interest. The 1920 Act contains no provision for the issuance of leases covering fractional or future interests under

¹⁷ The existence of these provisions show the plain error of the district court in ordering the Secretary to reinstate Dorrough's acquired land lease on public lands.

¹⁸ The leases in this record reflect the diverse jurisdiction over public domain and acquired lands (and the error and confusion if the leases are not kept separate at all stages) by designating the Director of the Bureau of Land Management as the appropriate official to control operations under Snyder's public lands lease and the Regional Director, Soil Conservation Service, Lincoln, Nebraska, under Dorrough's acquired lands lease (Plaintiff's Exhibit 13, Sec. 2 (p) : Plaintiff's Exhibit 10, Secs. 2 (r) and 2 (w)).

that statute, while the 1947 Act contains specific authority for the issuance of leases of such interests under that Act. 30 U. S. C. Sec. 354, *infra*, p. 38. Obviously, in this respect, the 1920 Act cannot be used as authority to lease a future or fractional interest of acquired lands and, again, different provisions are required in the applications to lease and in the leases issued.

Finally, the legislative history of the 1947 Act establishes that Congress knew that the leases and leasing procedure under the two Acts would have to be separate and authorized the Secretary to promulgate different rules and regulations. The phrase "to the extent that they are applicable" was added to the statement that his "rules and regulations shall be the same as those prescribed under the mineral leasing laws" (30 U. S. C. Sec. 359, *infra*, p. 39), for that very reason. Thus, as originally drafted the Act did not contain that phrase. At the request of the Senate Committee on Public Lands, Oscar L. Chapman, Under Secretary of the Interior, commented on that feature of the original bill, as follows (S. Rept. No. 161, p. 4, 80th Cong., 1st sess.):

Section 10 authorizes the Secretary of the Interior to prescribe necessary rules and regulations under the Act but requires that such rules and regulations shall be the same as those prescribed under the mineral leasing laws. *Since conditions with respect to acquired lands differ in several respects from those pertinent to public lands, complete conformity of the regulations is not possible.* Even without any such requirement this Department in the interest of uniformity would, if the bill is enacted, apply the same general regulations both to the public and acquired lands. *It probably was not intended by the use of the restrictive language to prevent the issuance of regulations different from those applicable to the public lands if necessary to carry out the purposes of the act.* However, in order to remove any doubt, it is suggested that the words "to the extent that they are applicable" be added at the end of section 10. [Emphasis supplied.]

The suggestion was approved by the Committee (S. Rept. No. 161, *supra*, p. 12) and enacted into law.

Thus, Congress having established the distinction between leases on the two types of land, the Secretary of the Interior was required to preserve that distinction. Moreover, under the authority given him to make rules and regulations which, in his opinion, would effectuate the terms and intention of the two statutes, he was empowered to establish rules and make decisions requiring preservation of that distinction in all instances wherein he believed it to be expressly required by Congress, intended by Congress, essential to the purposes of the statutes, or reasonable to efficient administration.¹⁹ Therefore, there was by virtue of the statutory provisions a reasonable (we submit, a required) basis for the Secretary's ruling that an application to lease acquired lands under the 1947 Act is not a proper application entitled to a priority for a lease of public lands under the 1920 Act.

The administrative constructions preserving the distinction have been plain, consistent, known to the public, and eminently reasonable in application (considering the different problems that arise respecting the two types of land) since the passage of the 1947 statute. The first regulations issued under the 1947 Act (in force when Dorough applied) provided that "*applications under the act* should be filed with the Bureau of Land Management" [emphasis supplied] in Washington. 43 C. F. R. 200.5 (1947 Supp.), *infra*, p. 42. At the same time, the regulations under the 1920 Act provided that applications "be filed in the proper district land office or, for lands or deposits in States in which there is no district land office, in the Bureau of Land Management * * *" in Washington. 43 C. F. R. 192.42 (1946 Supp.), *infra*, p. 40.²⁰

¹⁹ The administrative discretion, in matters wherein Congress has left it to the official to determine "necessity," has not been limited to the meaning "indispensable," but extends to mean "advantageous," "expedient," "desirable," and "advisable." *Rindge Co. v. County of Los Angeles*, 262 U. S. 700 (1923); *Old Dominion Co. v. United States*, 269 U. S. 55 (1925); *United States v. Carmack*, 329 U. S. 230 (1946); *Simmonds v. United States*, 199 F. 2d 305 (C. A. 9, 1952).

²⁰ The present regulations issued under the two statutes expressly prescribe entirely different lease-offer forms for applying under each act. 43 C. F. R. 200.4, 200.5 (b); 43 C. F. R. 192.42. As will be shown, the

The acquired lands regulations required the application for a lease to contain "(a) a separate statement of the applicant's interests, direct and indirect, in leases or permits for similar mineral deposits, or in applications therefor, on Federally-owned acquired lands in the same state * * *." 43 C. F. R. 200.5 (1947 Supp.), *infra*, p. 42. The public land regulations required the application to contain "(c) a statement of the interests, direct and indirect, held by the applicant in oil and gas leases, and applications therefor on public lands in the same State * * *." 43 C. F. R. 192.42 (1946 Supp.), *infra*, p. 40.

The managers of the district land offices were authorized to issue noncompetitive public land leases. 43 C. F. R. 4.275 (a) (17) (1946 Supp.); 43 C. F. R. 50.501 (a) (17) (1947 Supp.). They had no authority with respect to acquired land leases. Authority to issue those leases was delegated only to the Director of the Bureau of Land Management. 43 C. F. R. 4.275 (54) (1947 Supp.).

As we have shown, the revenues from leases issued under the 1920 Act must be distributed in a different manner from those received from leases under the 1947 Act. The distribution of the revenues received under the latter Act will vary widely, depending upon the provisions of the statutes under which the lands were acquired. For this reason until recently the revenues from public domain leases were payable to the district land office managers, but revenues from acquired lands leases were payable directly to the Bureau of Land Management in Washington which alone was equipped to handle the complex distribution problem involved. 43 C. F. R. 191.13 (1946 Supp.), *infra*, p. 40; 43 C. F. R. 4.275(54) (1947 Supp.), *infra*, p. 41.

Applications for leases of acquired lands were to contain specific information concerning fractional and future interests of the United States and to identify "(1) the administrative unit or project of which the land is a part, the purpose for which the land was acquired by the United States, and the name of the governmental body having jurisdiction over the lands, (2)

regulations have made this unambiguously clear from the beginning by requiring different information for each type of lease.

the name of the persons who conveyed the lands to the United States, (3) the date of such conveyance, and the place, liber and page number of its official recordation." 43 C. F. R. 200.5, 200.6, 200.7 (1947 Supp.), *infra*, pp. 42-43. These requirements, of course, cannot apply to public lands.

The Department's records of leases under the two statutes are physically separate and distinct. The records under the 1920 Act consist of "tract books" maintained in both Washington and the field offices. "The District Land Offices are the local source of information and records relating to the public lands." 43 C. F. R. 50.33 (1946 Supp.), *infra*, p. 39. The records under the 1947 Act consist of "plat records" which until recently were maintained only in Washington. *Van Arsdale*, 62 I. D. 475, 477, fn. 2 (1955); *E. A. Vaughey*, 63 I. D. 85, 90 (1956). Acquired lands leases and public lands leases are identified as such by an appropriate symbol and by the title of the document (Jt. App. 35a, 45a, 49a). In view of the separate record system, separate and readily identifiable leases are necessary to enable the Department to determine whether particular land is open to leasing and thus to avoid the filing of conflicting applications and the issuance of conflicting leases,²¹ to enable the Department readily to determine whether the issuance of a lease would violate the separate acreage limitations, and as a means of segregating revenues from the two types of leases.

Every lease issued is expressly made subject to the requirements of the pertinent statute and the regulations of the Secretary then or thereafter promulgated by the Secretary under that statute (Jt. App. 35a, 45a, 49a). Congress, of course, required this by enacting different provisions in the two statutes and by authorizing different regulations to effectuate

²¹ In the present case, for example, the inclusion in an acquired lands application and acquired lands lease of the 40 acres of public domain land at issue left public domain records clear when intervenor filed his application and was issued a lease. A similar situation is disclosed in *G. G. Stanford*, 61 I. D. 232 (1953), where a public domain lease was issued to a second applicant upon a clear record because the first applicant had filed an acquired lands application for a lease of public domain oil and gas interests. These cases illustrate the inevitable confusion which will arise if the Secretary is not permitted to enforce his requirement that applications to lease should be filed under the proper statutes, and establish the soundness of that requirement.

them. Since public lands included in an acquired lands lease would be subject to the materially different provision of the Acquired Lands Act (and vice versa), it is not sensible to honor or favor applications to lease which invite the type of error involved here in contravention of the express will of Congress.

Those differences in the regulations and procedures under the two acts are sufficient to show that a *proper* application entitled to a priority must be one seeking a lease under the Act applicable to that type of land. The administrative rulings have consistently so declared.

Thus, in *E. A. Wight*, 60 I. D. 215 (1948), an application to lease acquired lands was filed with the Bureau of Land Management in Washington. In processing the application the Bureau found that the lands described were former public domain lands which had been patented with a reservation of minerals to the United States. It was held that such reserved minerals were subject to lease only under the Mineral Leasing Act of 1920, as amended. It was held further that the application to lease acquired lands was not a proper application entitled to a priority as against a subsequent public domain application under the 1920 Act which was filed in the proper district land office. In *G. G. Stanford*, 61 I. D. 232 (1953), an application was filed to lease certain lands as acquired lands and a subsequent application was filed to lease the same lands as public lands. The lands were in fact public lands. The Secretary held that "Under the circumstances, the Stanford application [for acquired lands] cannot justifiably be regarded as the proper application which could have gained for Mr. Stanford a preference right to an oil and gas lease on the mineral deposits in the land in question." A public land lease was issued to the second applicant because he had filed the first proper application.

In the instant case, the district court did not show and it cannot show that the Secretary's regulations and rulings are not reasonably designed to accomplish the statutory purpose. Dorough made no effort to comply with the regulations. We submit that the Secretary's construction of the priority provision of the 1920 Act was required by the terms and intention of two statutes and by the separate regulations which he

was authorized to issue. In any event, his administrative construction was "permissible, even if not inevitable." *Chapman v. Sheridan-Wyoming Coal Co.*, 338 U. S. 621, 631 (1950). His conclusion, therefore, should not be overturned by the courts. *Hammond v. Hull*, 76 U. S. App. D. C. 301, 303, 131 F. 2d 23, 25 (1942) certiorari denied, 318 U. S. 777; *Unemployment Compensation Comm. v. Aragon*, 329 U. S. 143, 153 (1946); *United States v. Wilbur*, 283 U. S. 414 (1931); *Wilbur v. United States*, 281 U. S. 206 (1930); *Ness v. Fisher*, 223 U. S. 683 (1912); *United States v. Hammers*, 221 U. S. 220 (1911); *Hall v. Payne*, 254 U. S. 343 (1920).

Moreover, from another viewpoint, this Court said in *McKay v. Wahlenmaier*, 96 U. S. App. D. C. 313, 226 F. 2d 35, 43 (1955), which denied priority to an application to lease that did not comply with the regulations and other less formal requirements of the Secretary, that the Secretary "may not justify, simply by saying the violation is unimportant, his departure in a single case from an otherwise consistent policy of rejecting applications which do not conform to the regulations." Contrary to the ruling of the court below (Jt. App. 76a), the fact that the Secretary possessed authority to lease the lands involved does not render valid an application filed under the wrong statute. *West v. Work*, 56 App. D. C. 191, 11 F. 2d 828 (1926), certiorari denied, 271 U. S. 689; *Phillips Petroleum Co. v. McKay*, Civil No. 5024-53 (U. S. D. C. for D. C., June 17, 1955).

The Secretary's requirement that a proper application is one filed under the proper statute imposes no unwarranted or unequal hardship on applicants. The burden is on the applicant to qualify and establish rights under the leasing laws. The Interior Department is not bound to hire enough employees, open enough offices, or keep enough records to guarantee an applicant's ability to qualify.²² The same public records are available to all applicants that are available to the Govern-

²² The fact that the regulations require applicants to file for acquired lands in one location and for public lands in another and to furnish different information on such applications, etc., places the burden on applicants themselves to sort out the types of land. Valuable oil and gas leases on federal lands on minimum terms are a matter of grace, not of right, so that it is reasonable to place such burden on the applicants.

ment. Thus, the Bureau of Land Management in Washington and the district offices have the records of the disposals of public lands. They are public records. The regulations provide that "the District Land Offices are the local source of information and records relating to the public lands." 43 C. F. R. 50.33 (1946 Supp.), *infra*, p. 39. The Interior Department does not have the records relating to all lands acquired by the United States. In Section 7 of the 1947 Act (30 U. S. C. Sec. 356, *infra*, p. 39), Congress recognized that those records are in the possession of the agency having jurisdiction over the acquired lands. It required those agencies to furnish the Secretary "all pertinent abstracts, title papers, and other documents in the possession of such agencies concerning the status of the title of the United States to the mineral deposits that may be found in such lands." Therefore, as to acquired lands, the Secretary is furnished the same type of information that anyone may obtain from an abstract or title company.

Dorough could have determined the correct status of the land as readily as Snyder did. The official, public records of public land disposals in the Billings Land Office showed the entry of the patent, on NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 7, to Selmer K. Danielson with the notation "7/17/14" (Jt. App. 63a (22) and "Oil and Gas 7/17/14" (Jt. App. 63a (3)), and disclosed that a prior entryman had been required to execute an oil and gas waiver to the United States (Jt. App. 63a (3)). The Washington records contained the notation "Oil & Gas reserved to U. S. Act July 17, 1914" (Jt. App. 63a (1)). The McKenzie County records contained the deed from the Danielsons back to the United States recorded January 22, 1942, and that deed expressly recited that it was "subject to the reservations and exceptions contained in the patent from the United States" (Jt. App. 60a). The Status Sheet on file in the Billings Land Office, at the time Dorough was erroneously informed as to the status of the land, noted that the patent contained an oil and gas reservation (Jt. App. 14a, 36a-37a). At the very least these repeated entries suggested the necessity to examine the patent, a copy of which would have been furnished by mail from the Department. The patent itself spelled out the reservations of oil and gas deposits (Jt. App. 58a).

B. The fact that Dorough relied upon a mistake by an Interior Department employee is no basis for a different decision

There were three mistakes made at the outset of the events which had led to this litigation. The first was by Dorough in filing a miscellany of land descriptions in the district land office, 80% of which were outside the jurisdiction of that office under plain terms of the regulations. The second was by an employee of that office who, in sorting the wheat from the chaff in Dorough's application, overlooked the oil and gas reservation to the United States and erroneously advised him that the 40 acres involved here were acquired lands. The third mistake was by Dorough in not checking that information with the records in the district land office which showed the correct status and appealing from the rejection.

The mistake by the subordinate official of the United States could not defeat Dorough's statutory priority. *Federal Crop Ins. Corp. v. Merrill*, 332 U. S. 380 (1947); *Utah Power & Light Co. v. United States*, 243 U. S. 389, 409 (1917). He lost his right to a public land lease when he failed to appeal and thus avail himself of the administrative remedy.²³ *Burnham Chemical Co. v. Krug*, 81 F. Supp. 911 (D. C. 1949), affirmed *Burnham Chemical Co. v. Chapman*, 86 U. S. App. D. C. 412, 181 F. 2d 288 (1950), certiorari denied, 340 U. S. 826; *Charles D. Edmondson, et al.*, 61 I. D. 355 (1954).

Moreover, the Secretary, in administering property of the United States according to statute and rules authorized by statute, cannot be bound or estopped by assertions or agreements whose effect would contravene that law. *United States v. Santa Fe Pacific R. Co.*, 314 U. S. 339, 360 (1941); *United States v. San Francisco*, 310 U. S. 16, 31-32 (1940); *Utah v. United States*, 284 U. S. 534, 545, 546 (1932); *Cramer v. United States*, 261 U. S. 219, 234 (1923); *James Bayou Fishing & Hunting Club v. United States*, 260 U. S. 561, 564 (1923); *Lee Wilson & Co. v. United States*, 245 U. S. 24, 31 (1917); *Utah Power & Light Co. v. United States*, 243 U. S. 389, 409 (1917).

²³ The same mistake by a subordinate official did not defeat Snyder's priority. He appealed and thus afforded the Department an opportunity to correct the mistake.

C. The Secretary was empowered to cancel the lease issued to Dorough because it was void as unauthorized

It has been shown that the Secretary was correct in holding that Snyder filed the first proper application. In *McKay v. Wahlenmaier*, 96 U. S. App. D. C. 313, 226 F. 2d 35 (1955), this Court held that the Secretary was under a mandatory duty to cancel an oil and gas lease issued in contravention of the statutory priority accorded by the 1920 Act. See also *Call v. Richfield Oil Corp.*, 101 F. Supp. 972 (S. D. Cal. 1951). The *Wahlenmaier* case is dispositive of the issue in this case.²⁴

Appellee relied below upon a number of cases holding that the Secretary may not cancel administratively a patent duly issued. Such cases do not apply to administrative cancellation of oil leases. They depend upon the premise that, under the statutes governing the issuance of patents, an issued patent passes all title of the United States and the Secretary loses all jurisdiction to deal with it *administratively* thereafter. On the other hand, the issuance of even a valid lease does not end the legal interest of the United States or the administrative control by the Secretary. 30 U. S. C. Sec. 188, *infra*, p. 34.²⁵

²⁴ That decision accords with the repeated administrative construction that the Secretary has power to cancel leases issued without authority of law. E. g., *Marie J. Anderson*, A-24663 (Aug. 12, 1947); *J. W. Falke*, A-25871 (Aug. 16, 1950); *Eugene Robert Massom*, A-26524 (Dec. 8, 1952); *John J. Farelly*, 62 I. D. 1 (1955); *Van Arsdale*, 62 I. D. 475 (1955); *Madison Oils, Inc.*, 62 I. D. 478 (1955); *Holbeck and McFadden v. The Texas Company*, A-27167, A-27182 (Nov. 14, 1955). The Secretary has exercised his administrative power to cancel where the lease was issued to one not the first applicant (*Reay v. Lackie*, 60 I. D. 29 (1947); *Iola Morrow*, A-27177 (Oct. 10, 1955)) or was issued to one who was the first applicant, but not the first qualified applicant, in violation of the mandate of the 1920 Act. *Transco Gas & Oil Corp.*, 61 I. D. 85 (1952).

²⁵ Appellee contended below that, under this section of the 1920 Act (30 U. S. C. Sec. 188), the cancellation could only be by court action because there was production from other land in the lease beginning on May 7, 1954. Plainly, that section only applies to the cancellation of a valid lease because of default by the lessee in the performance of its terms. *Call v. Richfield Oil Corp.*, 101 F. Supp. 972 (S. D. Cal. 1951); *Luna C. Wooton*, 60 I. D. 236, 238 (1948); *Iola Morrow*, A-27177 (Oct. 10, 1955); *Holbeck and McFadden v. The Texas Company*, A-27167, A-27182 (Nov. 14, 1955). Moreover, both the production of oil from lands included in the lease and the inclusion of these lands within the known geologic structure of the Charlson Field occurred subsequently (March 12, 1955) to the cancellation of appellee's lease on February 16, 1954 (Jt. App. 55a, 64a, 70a).

CONCLUSION

For the reasons stated, it is submitted that the judgment of the district court should be reversed.

Respectfully.

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FEBRUARY 1957.

APPENDIX

The relevant portions of the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, as amended, 30 U. S. C. sec. 181, *et seq.*, are as follows (in the Code):

§ 181. *Lands subject to disposition; persons not entitled to benefits; helium rights reserved.*

Deposits of coal, phosphate, sodium, potassium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under sections 513-519 of Title 16, and those in incorporated cities, towns, and villages and in national parks and monuments, those acquired under other Acts subsequent to February 25, 1920, and lands within the naval petroleum and oil-shale reserves, except as hereinafter provided, shall be subject to disposition in the form and manner provided by sections 181-184, 185-188, 189-194, 201, 202-209, 211-214, 223, 224-226, 226d, 226e, 227-229a, 241, 251, 261-263 of this title to citizens of the United States, or to associations of such citizens, or to any corporation organized under the laws of the United States, or of any State or territory thereof, or in the case of coal, oil, oil shale, or gas, to municipalities. Citizens of another country, the laws, customs, or regulations of which deny similar or like privileges to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of said sections.

The United States reserves the ownership of and the right to extract helium from all gas produced from lands leased or otherwise granted under the provisions of said sections, under such rules and regulations as shall be prescribed by the Secretary of the Interior: *Provided further*, That in the extraction of helium from gas produced from such lands it shall be so extracted as to cause

no substantial delay in the delivery of gas produced from the well to the purchaser thereof. As amended Aug. 8, 1946, c. 916, §§ 1, 11, 60 Stat. 950.

§ 182. *Lands disposed of with reservation of deposits of coal, and so forth.*

The provisions of sections 181-194, 201, 202-208, 211-214, 223-229, 241, 251, and 261-263 of this title shall also apply to all deposits of coal, phosphate, sodium, oil, oil shale, or gas in the lands of the United States, which lands may have been or may be disposed of under laws reserving to the United States such deposits, with the right to prospect for, mine, and remove the same, subject to such conditions as are or may hereafter be provided by such laws reserving such deposits. Feb. 25, 1920, c. 85, § 34, 41 Stat. 450.

§ 188. *Forfeiture or cancellation of leases.*

Except as otherwise herein provided, any lease issued under the provisions of sections 181-184, 185-188, 189-194, 201, 202-209, 211-214, 223, 224-226, 226d, 226e, 227-229a, 241, 251, 261-263 of this title may be forfeited and canceled by an appropriate proceeding in the United States district court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of said sections, of the lease, or of the general regulations promulgated under said sections and in force at the date of the lease; and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions thereof.

Any lease issued after August 21, 1935, under the provisions of section 226 of this title shall be subject to cancellation by the Secretary of the Interior after thirty days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas. Such notice in advance of cancellation shall be sent the lease owner by registered letter directed to the lease owner's record

post-office address, and in case such letter shall be returned as undelivered, such notice shall also be posted for a period of thirty days in the United States land office for the district in which the land covered by such lease is situated, or in the event that there is no district land office for such district, then in the post office nearest such land. Notwithstanding the provisions of this section, however, upon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law: *Provided, however,* That when the time for payment falls upon any day in which the proper office for payment is not open, payment may be received the next official working day and shall be considered as timely made. As amended Aug. 8, 1946, c. 916, § 9, 60 Stat. 956; July 29, 1954, c. 644, § 1 (7), 68 Stat. 585.¹

§ 191. *Disposition of moneys received.*

All money received from sales, bonuses, royalties, and rentals of public lands under the provisions of sections 181-184, 185-188, 189-194, 201, 202-209, 211-214, 223, 224-226, 226d, 226e, 227-229a, 241, 251, and 261-263 of this title shall be paid into the Treasury of the United States; 37½ per centum thereof shall be paid by the Secretary of the Treasury as soon as practicable after December 31 and June 30 of each year to the State or the Territory of Alaska within the boundaries of which the leased lands or deposits are or were located; said moneys to be used by such State, Territory, or subdivisions thereof for the construction and maintenance of public roads or for the support of public schools or other public educational institutions, as the legislature of the State or Territory may direct; and, excepting those from Alaska, 52½ per centum thereof shall be paid into, reserved and appropriated, as a part of the reclamation fund created by sections 372, 373, 381, 383,

¹ The last sentence commencing with "Notwithstanding * * *" was added by the 1954 amendment.

391, 392, 411, 416, 419, 421, 431, 432, 434, 439, 461, 491, and 498 of Title 43: *Provided*, That all moneys which may accrue to the United States under the provisions of sections 181-184, 185-188, 189-194, 201, 202-209, 211-214, 223, 224-226, 226d, 226e, 227-229a, 241, 251, and 261-263 of this title from lands within the naval petroleum reserves shall be deposited in the Treasury as "miscellaneous receipts", as provided by section 524 of Title 34. All moneys received under the provisions of sections 181-184, 185-188, 189-194, 201, 202-209, 211-214, 223, 224-226, 226d, 226e, 227-229a, 241, 251, and 261-263 of this title not otherwise disposed of by this section shall be credited to miscellaneous receipts. Nothing herein contained shall be construed to affect the disposition of proceeds or income derived by the United States from mineral school sections in the Territory of Alaska as provided for in section 353 of Title 48. As amended May 27, 1947, c. 83, 61 Stat. 119; Aug. 3, 1950, c. 527, 64 Stat. 402.²

§ 226. *Lease of oil or gas lands; royalties and annual rentals; drainage agreements.*

* * * * *

When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under said sections shall be entitled to a lease of such lands without competitive bidding. * * * [Act of August 8, 1946, Sec. 3, 60 Stat. 951]

The relevant portions of the Mineral Leasing Act for Acquired Lands of August 7, 1947, 61 Stat. 914, 30 U. S. C. sec. 351, *et seq.*, are as follows (in the Code):

§ 351. *Definitions.*

As used in this chapter "United States" includes Alaska. "Acquired lands" or "lands acquired by the United States" include all lands heretofore or hereafter

² The 1950 Act provided that payments to the States be made biannually instead of annually.

acquired by the United States to which the "mineral leasing laws" have not been extended, including such lands acquired under the provisions of sections 480, 500, 513-519, 521, 552, and 563 of Title 16. "Secretary" means the Secretary of the Interior. "Mineral leasing laws" shall mean sections 432-438 and 439-452 of Title 48; sections 181-184, 185-188, 189-194, 201, 202-209, 211-214, 223, 224-226, 226d, 226e, 227-229a, 241, 251, 261-263, 271-276, and 281-286 of this title, and all Acts heretofore or hereafter enacted which are amendatory of or supplementary to any of the foregoing sections. "Lease" includes "prospecting permit" unless the context otherwise requires. Aug. 7, 1947, c. 513, § 2, 61 Stat. 913.

§ 352. *Deposits subject to lease; consent of department heads; lands excluded.*

Except where lands have been acquired by the United States for the development of the mineral deposits, by foreclosure or otherwise for resale, or reported as surplus pursuant to the provisions of the Surplus Property Act of 1944, all deposits of coal, phosphate, oil, oil shale, gas, sodium, potassium, and sulfur which are owned or may hereafter be acquired by the United States and which are within the lands acquired by the United States (exclusive of such deposits in such acquired lands as are (a) situated within incorporated cities, towns and villages, national parks or monuments, (b) set apart for military or naval purposes, or (c) tidelands or submerged lands) may be leased by the Secretary under the same conditions as contained in the leasing provisions of the mineral leasing laws, subject to the provisions hereof. The provisions of sections 271-276 of this title shall apply to deposits of sulfur covered by this chapter wherever situated. No mineral deposit covered by this section shall be leased except with the consent of the head of the executive department, independent establishment, or instrumentality having jurisdiction over the lands containing such deposit, or holding a mortgage or deed of trust secured by such

lands which is unsatisfied of record, and subject to such conditions as that official may prescribe to insure the adequate utilization of the lands for the primary purposes for which they have been acquired or are being administered * * *. Aug. 7, 1947, c. 513, § 3, 61 Stat. 914.

§ 354. *Lease of partial or future interests in deposits.*

Where the United States does not own all of the mineral deposits under any lands sought to be leased and which are affected by this chapter, the Secretary is authorized to lease the interest of the United States in any such mineral deposits when, in the judgment of the Secretary, the public interest will be best served thereby; subject, however, to the provisions of section 352 of this title. Where the United States does not own any interest or owns less than a full interest in the minerals that may be produced from any lands sought to be leased, and which are or will be affected by this chapter and where, under the provisions of its acquisition, the United States is to acquire all or any part of such mineral deposits in the future, the Secretary may lease any interest of the United States then owned or to be acquired in the future in the same manner as provided in the preceding sentence. Aug. 7, 1947, c. 513, § 5, 61 Stat. 914.

§ 355. *Disposition of receipts.*

All receipts derived from leases issued under the authority of this chapter shall be paid into the same funds or accounts in the Treasury and shall be distributed in the same manner as prescribed for other receipts from the lands affected by the lease, the intention of this provision being that this chapter shall not affect the distribution of receipts pursuant to legislation applicable to such lands: *Provided, however,* That receipts from leases or permits for minerals in lands set apart for Indian use, including lands the jurisdiction of which has been transferred to the Department of the Interior by the Executive order for Indian use, shall be deposited in a special fund in the Treasury until final disposition

thereof by the Congress. Aug. 7, 1947, c. 513, § 6, 61 Stat. 915.

§ 356. *Furnishing description of lands and title documents; recordation of documents; authenticated copies.*

Upon request by the Secretary, the heads of all executive departments, independent establishments, or instrumentalities having jurisdiction over any of the lands referred to in section 351 of this title shall furnish to the Secretary the legal description of all of such lands, and all pertinent abstracts, title papers, and other documents in the possession of such agencies concerning the status of the title of the United States to the mineral deposits that may be found in such lands.

Abstracts, title papers, and other documents furnished to the Secretary under this section shall be recorded promptly in the Bureau of Land Management in such form as the Secretary shall deem adequate for their preservation and use in the administration of this chapter, whereupon the originals shall be returned promptly to the agency from which they were received. Duly authenticated copies of any such abstracts, title papers, or other documents may, however, be furnished to the Secretary, in lieu of the originals, in the discretion of the agency concerned. Aug. 7, 1947, c. 513, § 7, 61 Stat. 915.

§ 359. *Rules and regulations.*

The Secretary of the Interior is authorized to prescribe such rules and regulations as are necessary and appropriate to carry out the purposes of this chapter, which rules and regulations shall be the same as those prescribed under the mineral leasing laws to the extent that they are applicable. Aug. 7, 1947, c. 513, § 10, 61 Stat. 915.

The relevant portions of the regulations of the Secretary of the Interior are as follows:

43 C. F. R. 50.33 (1946 Supp.). *District Land Offices.* There are twenty-two District Land Offices in the United States and three in Alaska, each in the charge of a Manager, who reports to the Director. The Bureau

of Land Management at Washington, D. C., serves those States in which no district land office is maintained. The District Land Offices are the local source of information and records relating to the public lands. All applications and claims concerning land in the district and payment of required fees and rentals are filed in these offices. The Managers forward all matters requiring action by the Director or the Secretary. Patents, leases, and decisions are sent to the Managers for delivery to applicants and claimants.

43 C. F. R. 191.2 (1946 Supp.). *Lands and deposits to which mineral leasing act does not apply.* The mineral leasing act does not apply (a) to lands containing the mineral deposits named in § 191.1 where such lands are situated in (1) national parks and monuments; (2) Indian reservations; (3) incorporated cities, towns and villages, or (4) naval petroleum and oil shale reserves; nor (b) to lands acquired under the act of March 1, 1911 (36 Stat. 961; 16 U. S. C. 513-519) known as the Appalachian Forest Reserve Act, or other acquired lands.

43 C. F. R. 191.13 (1946 Supp.). *Payments of rentals and royalties.* Rentals and royalties under all leases and permits issued under the act shall be paid to the manager of the district land office for the land district in which the leased lands are situated. In States where there are no district land offices such payments shall be filed with the Director, Bureau of Land Management. All remittances shall be made payable to the Treasurer of the United States and shall be accompanied by a letter of transmittal on Form 4-974 (oil and gas) or Form 4-976 (coal, potash, etc.). The transmittal letter shall be in triplicate and shall be completely filled out and signed by the payer.

43 C. F. R. 192.42 (1946 Supp.). * * *

* * * * *

The application must contain in substance the following:

* * * * *

(c) A statement of the interests, direct and indirect, held by the applicant in oil and gas leases, and applications therefor on public lands in the same State, identifying by serial number the records wherein such interests may be found.

43 C. F. R. 4.275 (a) (54) (1947 Supp.). *Functions with respect to various statutes.* (a) The Director of the Bureau of Land Management, and the several regional administrators and district managers of that bureau when authorized to do so by an order of the Director published in the Federal Register, may act in relation to the following classes of matters without obtaining Secretarial approval, unless the Secretary in any particular determines otherwise, and subject in any event to an appeal to the Secretary according to the rules of practice (43 CFR, Part 221):

* * * * *

(54) Applications for, and the issuance, renewal, consolidation, modification, revocation, and cancellation of, oil and gas competitive and noncompetitive leases, coal leases, and coal, sodium and sulphur permits in acquired lands subject to the act of August 7, 1947 (61 Stat. 913; 30 U. S. C. 351-359), in acquired lands subject to section 502, Reorganization Plan No. 3 of 1946 (3 CFR, 1946 Supp., Chapter IV) and in acquired lands, other than Indian lands, under the jurisdiction of the bureaus and agencies of the Department of the Interior; with respect to all types of leases or permits for oil, gas, oil shale, coal, sodium, sulphur, potassium and phosphate in such acquired lands, the approval of assignments or royalty interests therein, operating agreements and assignments of such agreements, and subleases, the acceptance of surrenders of parts or all of such leases and permits, and the approval of all bonds filed in connection with such leases and permits, and the execution of agreements for payment, because of drainage, of compensatory royalties.

43 C. F. R. 50.501 (1947 Supp.). *Functions with respect to various statutes.* (a) The Managers may act

in relation to the following classes of matters in accordance with applicable regulations and procedures, without obtaining the approval of the Director or the Regional Administrators, unless the Director in any particular matter determines otherwise, subject in any event to an appeal to the Director and from his decision to the Secretary, in accordance with the rules of practice (43 CFR, Part 221).

* * * * *

(17) Applicants for oil and gas noncompetitive leases under section 17 of the Act of February 25, 1920 (41 Stat. 437, 443), as amended August 21, 1935 (49 Stat. 674, 676; 30 U. S. C. 226), the issuance of such leases and consolidations, modifications, revocations and cancellations relating thereto. [By reference to 43 C. F. R. 4.275 (a) (17) (1946 Supp.)]

43 C. F. R. 200.5 (1947 Supp.). *Supplemental information required in lease or permit applications, and place for application-filing.* In addition to the information required by the appropriate regulations, referred to in § 200.4, each application for a lease or permit must contain (a) a separate statement of the applicant's interests, direct and indirect, in leases or permits for similar mineral deposits, or in applications therefor, on Federally-owned acquired lands in the same State, identifying by serial number the records where such interests may be found, and (b) a complete and accurate description of the lands for which a lease or permit is desired. If surveyed according to the governmental "rectangular system," legal subdivisions should be used in the description; otherwise by metes and bounds connected with a corner of the public surveys by courses and distances, by lot numbers with reference to the appropriate recorded plat or map, or by any other method of description best suited to identify the lands most clearly and accurately. The description should, if practicable, refer to (1) the administrative unit or project of which the land is a part, the purpose for which the land was acquired by the United States, and the name of the gov-

ernmental body having jurisdiction over the lands (2) the name of the persons who conveyed the lands to the United States, (3) the date of such conveyance, and the place, liber and page number of its official recordation.

All applications under the act should be filed with the Bureau of Land Management, Department of the Interior, Washington 25, D. C.

43 C. F. R. 200.6 (1947 Supp.). *Restrictions on holdings.* Acreage held by any lessee or permittee under this act shall be chargeable against and subject to the acreage limitations and restrictions set forth in the regulations cited in § 200.4. Where the United States owns only a fractional interest in the mineral resources of the lands involved, only that part of the total acreage involved in the lease which is proportionate to the ownership of the United States of the mineral resources therein shall be charged as acreage holdings. Agreements to issue a lease at some future time are not to be charged as acreage holdings until the lease for the future interest takes effect.

43 C. F. R. 200.7 (1947 Supp.). *Leases of future or fractional interests.* The Secretary may issue leases for fractional or future interests in mineral deposits covered by the act, whenever, in his judgment the public interest will best be served thereby. In leasing lands in which the fractional or other interest owned by the United States is different for different tracts, separate leases will issue for the different interests, or, a single lease may issue with separate development, production and royalty requirements for the different interests. Applicants for leases for fractional interests should in addition to the information required by §§ 200.4 and 200.5, submit a statement showing whether that portion of the mineral interest not owned by the United States has been leased and if so, the name and address of such lessee. Applicants for leases for future interests are required to submit a detailed showing as to contemplated development plans, and the terms and ownership of any outstanding lease covering the lands embraced in the application.

SUPPLEMENTAL MEMORANDUM FOR APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13636

FRED A. SEATON, SECRETARY OF THE INTERIOR, APPELLANT

v.

THE TEXAS COMPANY, A CORPORATION, APPELLEE

and

No. 13637

JOHN SNYDER, APPELLANT

v.

THE TEXAS COMPANY, A CORPORATION, APPELLEE

PERRY W. MORTON,*Assistant Attorney General,***ROGER P. MARQUIS,***Attorney,**Department of Justice, Washington, D. C.,**Counsel for Fred A. Seaton, Secretary of Interior, Appellant.***JAMES B. BROWNING,***1021 Tower Building, Washington, D. C.,**Counsel for John Snyder, Appellant.*

*United States Court of Appeals**For the**District of Columbia Circuit***FILED DEC 17 1957***Joseph W. Stewart***CLERK**

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(I)

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and

No. 13637

JOHN SNYDER, APPELLANT

v.

THE TEXAS COMPANY, A CORPORATION, APPELLEE

SUPPLEMENTAL MEMORANDUM FOR APPELLANTS

We have, of course, no intention of repeating here any of the arguments or citations previously relied upon or of now making a lengthy argument. However, since rehearing has now been granted and the case of *Barash v. Seaton*, No. 14069, has been argued additional comment on certain matters, including appellee's answer to the petition for rehearing, is, we believe, appropriate.

1. *The Secretary's power to cancel leases erroneously issued cannot vary depending upon the facts of the particular case or the kind of error involved.*—Appellee suggests, in its answer to the petition for rehearing, (page 5) that administrative power of cancellation “exists only when the lease is obviously void (not merely voidable)” and apparently seeks to distin-

guish the *Wahlenmaier* case on that ground.¹ At the recent argument of *Barash v. Seaton*, No. 14069, appellant Barash contended that the *Wahlenmaier* case governed his case and sought to distinguish the instant case on a similar ground. But, as we have stated in the petition for a rehearing, the authority to cancel stems from the long recognized power of the Secretary to correct errors. No distinction has been drawn as to what the mistake was and, we submit, no logical reason can be given why the Secretary would have power to correct one mistake and not another. Indeed, the impossibility of determining whether a particular mistake can or cannot be cured argues against any such distinction.²

Thus, the distinction argued by Texas Company, phrased in terms of "voidable" or "void" leases cannot logically exist. Moreover, if a distinction were to be made, in all reason and logic the result should be that the power to cancel is present in this case but lacking in the *Wahlenmaier*, *Barash*, and *McKenna* cases. This is so because appellee's answer to our petition for rehearing (page 3) says that the grounds for cancellation in *Wahlenmaier* were "fraud, deception and concealment."³ These have always been factors that render a transaction voidable not void. They do not go to the power of the Secretary. The issuance of a lease on the lands involved in *Wahlenmaier* was clearly authorized under the Mineral Leas-

¹ Appellee's suggestion (p. 4) that there is inconsistency between the Departmental positions in the *Wahlenmaier* case and this case is erroneous because the *Wahlenmaier* position was not that power to cancel any issued lease was lacking but simply that facts justifying cancellation were lacking.

² The appendix to our petition for rehearing (pp. 22-23) contained a letter from the State Supervisor of the Colorado Office of the Bureau of Land Management which divided into 12 categories the reasons for 98 cancellations between October 1956 and 1957. This listing is, of course, not exclusive of other reasons which might require cancellations. It vividly illustrates the confusion, difficulties and delays that would result from a holding that the Secretary had power to cancel in some situations but not others. Case by case definition of the two categories would obviously tend to delay and disrupt the execution of federal mineral leases.

³ Of course, as stated in our briefs previously filed, we view *Wahlenmaier* as a much broader decision. The case was based on alternative grounds and the Secretary's cancellation power was stated in footnote 11 to extend to the case of any lease "improvidently issued."

ing Act of 1920 and the result of the decision was issuance of such a lease to Wahlenmaier. The question related solely to the issue of who was entitled to the lease, Culbertson or Wahlenmaier. The *Barash* case likewise presented a situation where the Secretary was clearly authorized to issue a lease under the Mineral Leasing Act for Acquired Lands of 1947 and that result will follow whether Barash is right or wrong in his claim. The difference is simply whether competitive leases issued to Texas Company should stand or in place thereof non-competitive leases should be issued to Barash. Again in *McKenna v. Seaton*, No. 14095, a lease under the Mineral Leasing Act for Acquired Lands of 1947 is clearly issuable and the question is whether an application by DeArmas for a non-competitive lease was, as claimed by McKenna, so defective as to render the lease to DeArmas invalid and to constitute McKenna the first qualified applicant. In short, in all three cases a lease was clearly to issue under the particular statute and the issue was whether the wrong person had received the lease because of fraud and deception and because for other reasons he was a disqualified applicant (Wahlenmaier), because of mistake as to known geologic structure (Barash), or because of failure of an applicant to list his other holdings in his application (McKenna).

In contrast, the Texas Company lease which was cancelled as to the 40 acres involved in the present case was void because the Mineral Leasing Act for Acquired Lands, under which it purported to be issued, did not apply to this 40 acres. So far as the Texas Company lease is concerned, the case is legally the same as that suggested at the Barash argument of a purported lease by the Secretary of the Interior of the Washington Monument grounds. In both cases, the property is owned by the United States but the Secretary of the Interior is not authorized to execute the lease attempted to be given. To paraphrase the language of counsel for Barash, in both the present case and the Washington Monument illustration, the leases are mere scraps of paper without legal effect. The fact that here the Secretary could lease the land under another statute does not, we submit, enlarge the

power to execute the lease which was given since the statutes are mutually exclusive. The administration of Executive Departments is founded on the observance of each officer of the limits Congress places on his authority. The invalidity of the Texas Company lease would have been beyond argument if Congress had vested the administration of the Mineral Leasing Act for Acquired Lands in the Secretary of Agriculture. Cf. *Gibbs v. United States*, 150 F. 2d 504 (C. A. 4, 1945).⁴ The fact that the administration of both statutes was vested in the Secretary of the Interior cannot, we submit, justify ignoring the statutory limitations. This is not a mere matter of form since there are substantial differences which result from operating under the two statutes.

By the same token, the fact that a lease of this 40 acre tract was issued to Snyder subsequent to the Texas Company lease cannot, we submit, affect the Secretary's power to cancel a lease issued under the wrong statute. Moreover, to distinguish the *Wahlenmaier*, *Barash* and *McKenna* cases on the ground that here two purported leases are outstanding would produce the illogical result that the protestants in those cases who simply had filed applications were entitled to invoke the Secretary's power of cancellation whereas Snyder who had an application which had been approved and resulted in issuance of a lease could not.

Concluding this question we think it appropriate to add that, as to the inferences to be drawn as to Congressional intent mentioned in the opinion of the Court, it is abundantly

⁴ This case held that a deed by the National Housing Administrator "had no legal validity" because prior to its execution the Administrator had lost his statutory authority to sell this property by virtue of a letter transferring jurisdiction of the project to the Navy Department. The transfer was neither recorded in the local land records nor published in the Federal Register. It had received no publicity and its existence was unknown to the Commanding Officer of the Marine Base involved. The case is another example of the fact that persons seeking to obtain public property must ascertain at their peril the authority of the agents with whom they deal and the true status of the property sought and cannot rely on the representation of those agents in those respects. See also *United States v. Gilbertson*, 111 F. 2d 978 (C. A. 7, 1940) and cases cited at page 30 of the Secretary's original brief.

clear that Congress intends the limitations it imposes upon administrative authority to be followed and, hence, that purported action under a statute which does not authorize the action should be set aside by the administrative official as soon as he discovers the mistake.

2. *The stipulation of the parties does not warrant refusal to decide all of the issues of this case.*—This Court's opinion made reference to the stipulation of the parties and appellee argues that this justified the refusal to decide the controversy between Snyder and the Texas Company. But parties cannot by stipulation confer jurisdiction upon a federal court. Nor can they, we submit, deprive a federal court of existing jurisdiction. Certainly they cannot impose limitations on the Court's jurisdiction so that the result of the case is, in effect, an advisory opinion.⁵ This, of course, was not a situation of dismissal of the case under certain circumstances because jurisdiction has been exercised in part.

The fact is that the stipulation did not purport to restrict the jurisdiction of the district court or this Court. The stipulation simply provided for the details by which the court might make effective its decision in favor of one or the other claimants. It said (Jt. App. 31) that the parties agreed "that in the final judgment of the Court determining which party has the valid lease, this Court may and should order said parties to take all steps necessary to clear the title of the successful lessee" including surrender to the Secretary of the invalid lease and correction of the North Dakota land records. The exception did not purport to restrict the Court's jurisdiction. It merely said that "this stipulation should not apply" if the decision was that the cancellation was ineffective for lack of judicial proceedings, in other words, if the court failed to decide the merits.

Actually, the stipulation was probably pure surplusage, since the court, with the parties before it, usually has power to make such detailed provisions as are appropriate to effectuate its judgment. Such an understanding was expressed by

⁵ In *Barr v. Mateo*, Sup. Ct. No. 409 the *per curiam* opinion announced December 9, 1957, stated: "Thus, an advisory opinion cannot be extracted from a federal court by agreement of the parties * * *."

the court and counsel in the court below. (See *infra*, p. 11.) In view of the construction now sought to be given this stipulation, we print in the appendix hereto the portion of the record dealing with this matter, *infra*, p. 10-15. The trial court well stated the understanding when at the close of the colloquy it said "I was prompted to say what I did in an effort to make litigation, including whatever appeal is taken, of course, final as to the controversy between the parties. They want to know who can go in and operate on that 40 acres, and as far as possible that should be made the issue here now, if it isn't, so that when this litigation is terminated Mr. Snyder or the Texas Company has the lease on the 40 acres" (*Infra*, p. 15). We submit that this Court should make this intention of the parties effective by deciding the case.

3. *The present factual situation as to lease terms and oil production emphasizes the necessity for separation of public domain lands and acquired lands.*—Our briefs previously filed, as well as our petition for a rehearing, have discussed at some length the differences between a lease of public domain lands and of acquired lands. Dorrough's lease of acquired lands became effective December 1, 1951 (Jt. App. 10a). Snyder's lease was effective November 1, 1952 (Jt. App. 49a). Leases are for a primary term of five years and may be renewed for an additional two years. As is illustrated by the Texas Company lease (Jt. App. 46), the term continues "so long thereafter as oil or gas is produced in paying quantities." There are several producing wells in the immediate vicinity including on three sides lands adjoining the 40 acres here involved. (See plat facing Jt. App. 66a.) Texas Company has drilled six producing wells on lands included in its acquired lands lease. Apparently there has also been production from lands included in Dorrough's public lands lease. There has been no production from lands included in Snyder's lease. The area of the known geologic structure of the Charlson Field was defined effective March 12, 1955 (Jt. App. 70a). Thereafter, leases could be issued only as a result of competitive bidding.

If the district court's judgment ordering re-instatement of the acquired lands lease were to stand it is production from other lands included in that lease which totals some 1,669.94

acres (Jt. App. 44a) which would control the lease term as to these 40 acres. In other words, production from acquired lands would be determining the duration of a lease of public lands. Application of the only properly applicable statutory authority thus produces a difference in one of the basic terms of the lease, its duration. It cannot, we submit, simply be ignored or brushed aside as trivial.⁶

CONCLUSION

We believe that we have demonstrated three propositions which require reversal of the judgment below.

The first is that the historic power of the Secretary of the Interior to correct errors which inevitably occur in the course of managing a system of caring for and disposing of the real property of the United States and more particularly the mineral leasing program embraces, in the words of the *Wahlenmaier* case (footnote 11) "the right to cancel a lease improvidently issued to a disqualified applicant, to the prejudice of the rights of others, whether or not there is involved a violation of some provision of the statute or of a regulation."

Secondly, Congress in exercising its plenary power over federal real property has never given the courts general power to review the administrative actions in executing the direction of Congress relating to management and disposal of such property. Judicial intervention in such matters is permissible only to prevent arbitrary action, meaning "unreasoned"

⁶ It should be noted that if it should be held that the 40 acres could not be included in the acquired lands lease but that the Secretary acted whimsically in concluding that Snyder had a better right than Dorrough and that judgment directing issuance of a lease to Dorrough should be entered, a problem as to the proper date of the lease will emerge. Leases ordinarily are dated the month they are signed for the Government or the first of the following month, 43 C. F. R. 192.40 a. An effective date after March 1955 for a noncompetitive lease is precluded by the finding of known geologic structure. If, however, an attempt is made to relate back to the date Dorrough's leases to portions of the public domain were issued, questions whether the 5 year period has expired or whether production on some of the lands might be relied upon by means of amending some one of those leases to include these 40 acres would arise. We see no occasion now to argue those possibilities.

or "whimsical" action.⁷ Cancellation of a portion of a lease issued under the wrong statute and which consequently contains the wrong provisions as to duration of the lease term, as to distribution of the rents and as to the government agency responsible for supervising such matters as protecting this public property from injury cannot be so characterized. If anything, a refusal to cancel such an illegal lease would be unsupportable.

In the third place, we think it equally clear that a conclusion that Snyder has a better right to the lease cannot properly be called whimsical or unreasoned. It is not unreasonable to require recipients of the bounty represented by a federal mineral lease to ascertain the true status of lands they wish to lease, as Snyder did. The Department of the Interior was, we submit, clearly justified in refusing to undertake a burden of guaranteeing accuracy of all factual statements which may be made by any government employee in response to questions of prospective beneficiaries of the program. The burden has always been on homesteaders, pre-emption claimants, land grant railroads, etc., to establish rights they asserted to secure public domain. It is not error to apply the same principle to the mineral leasing portion of the public domain management program. Indeed, it would be arbitrary and whimsical, in order to justify issuance of a lease to Dorough, to ignore the lease record systems which have been established so that prospective lessees can ascertain the facts. For this reason alone the judgment below is clearly wrong.

Respectfully submitted.

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ROGER P. MARQUIS,
Attorney,
Department of Justice,
Washington, D. C.

DECEMBER 1957.

⁷ See *United States v. Carmack*, 329 U. S. 230, 243-244, fn. 14 (1946).

ADOPTION OF FOREGOING SUPPLEMENTAL MEMORANDUM BY
JOHN SNYDER, APPELLANT, IN No. 13637

In the interest of avoiding duplication, and under the order of this Court authorizing consolidated argument and brief in Nos. 13636 and 13637, John Snyder, appellant in No. 13637, herewith joins and adopts in full the foregoing supplemental memorandum.

JAMES R. BROWNING,
Counsel for John Snyder,
Appellant, in No. 13637.

APPENDIX

[Tr. 58-62]

The COURT. At the outset I don't want to belabor a point that counsel may conclude is not so important, but since you have said what you have about those state records you still have a state record out there that gives conflicting grants. It gives two different grants of leases to two different persons. That will have to be corrected somehow. It can't be corrected by a cancellation pro tanto of part of one of those leases.

Mr. WILLIAMS. My only answer to that I believe is that the prevailing party, Mr. Browning representing Mr. Snyder has the lease that the Secretary has declared to be valid; Mr. Wilson's client has the lease on the 40 acres which has been cancelled out, and I suppose that the side that wins is going to have to quiet title, somehow clear the record by action in the state court if they wish to do so.

The COURT. Or by an order of this Court directing the losing party to make conveyance.

Mr. WILLIAMS. That could be.

Mr. WILSON. Let me say this, if I may interrupt you, Mr. Williams.

When we started out with this case we gave great consideration as to whether the United States was an indispensable party and whether Mr. Snyder was an indispensable party. We concluded that neither was indispensable and proceeded accordingly.

Then after fifteen months Mr. Snyder came into the action with Mr. Browning.

When Mr. Snyder was not in the case the only remedy which we sought was a remedy to uncanceled the cancellation.

Your Honor has now given me an idea that I would like to follow up on in a moment, with a moment's thought, and that is, now that Mr. Snyder is in the case, if Your Honor should

conclude that we are right I would believe that we could have relief against Mr. Snyder in this same proceeding.

Mr. WILLIAMS. And vice versa?

Mr. WILSON. Well, why not?

Mr. WILLIAMS. I should think you could.

The COURT. I would think so, and if it is stipulated now then the case can go forward and if it requires any cross grants hereafter they can be ordered by this Court. This Court sitting as a court of equity, and having all the parties before it, I would think makes any order. I don't know that this Court could make an order that would change the state records, I don't think so.

Mr. WILLIAMS. I do not believe it has jurisdiction for that.

Mr. BROWNING. Your Honor, speaking for Mr. Snyder, the Intervenor, we would certainly be glad to stipulate that this Court having all the parties before it could and should enter an order requiring that the title be cleared in accordance with the Court's final judgment as to which party had the valid lease.

The COURT. Very well.

Mr. WILSON. Your Honor, what troubles me about that is whether we are impinging on the area of a suit against the United States. After all, the United States has the fee of this property, and we have been religiously avoiding any impingement upon the proprietary interest of the United States.

The COURT. I don't think that would be involved, as I see the issue now.

Mr. WILLIAMS. I should think as to this particular issue it is entirely between Mr. Snyder and The Texas Company. I don't believe the Government is involved in what is shown on the state records.

The COURT. I would think that is true.

Mr. WILSON. May I before I close the stipulation, if that's what it is, talk to my co-counsel about it, because while I appreciate Your Honor's assurance and assurance of counsel about it, I don't want to be met in the Court of Appeals with the contention that this is an action against the United States. That haunts too many people in this jurisdiction.

The COURT. What I have said was only to clear up the issue and be sure that the issue was clearly enough defined to give the ultimate relief that is desired on both sides.

Mr. WILSON. May we give Your Honor our reaction after lunch?

The COURT. Certainly. After the judgment of this Court is made on the issue that has been raised here, a suit based on that in the state court would follow by either party to clear the records in accordance with the findings made here.

Mr. WILSON. Yes. That was not my intention when we filed the suit originally.

The COURT. But if you can avoid that by making up the issue here so that it would be final that may be done.

* * * * *

AFTERNOON SESSION

[Tr. 73-78]

The DEPUTY CLERK. The *Texas Company* vs. *Seaton*.

Mr. WILSON. May it please the Court, we have discussed at lunch the question of the totality of relief available here, and I would like Your Honor's permission to expose one thought which troubles me a little bit; perhaps these gentlemen will relieve me in the statement.

As this case comes to Your Honor we are seeking only to have a cancellation uncanceled and disposed of. That would leave two leases both in the Department, so to speak, and on the county records. And now if this case would be designed to dispose of the survival of those two leases ultimately, it seems to me that Your Honor would not only in effect have to correct the record in North Dakota but you will have to cancel the Snyder lease which is now administratively existent.

That's what I said to you this morning, not very artistically, when I told you I was troubled about a suit against the United States. Conversely, if Your Honor should decide against us and the administrative cancellation stands, then there is no problem administratively but simply a cancellation on the record in North Dakota.

Now I am not sure whether Mr. Williams for the Government is in a position with power to agree that you may cancel the Snyder lease administratively in this proceeding.

The COURT. Mr. Browning is.

Mr. WILSON. Yes, and that's what I am coming to.

If Mr. Browning will agree that if Your Honor determines that Texas is entitled to win here, preserving his rights of appeal but within this stem of this proceeding that he will then surrender the Government lease which he has, as well as permit Your Honor to expunge it from the North Dakota record, then this whole thing can be buttoned up in one proceeding, and we are agreeable to it. Indeed, we are agreeable to it even with the Departmental complications, but we are not sure that Mr. Williams has the capacity—and I mean that not from his own limitations but with the power of the Department of Justice to agree to that.

Mr. WILLIAMS. I can help Mr. Wilson with some eminent authority.

Mr. WILSON. Don't argue the point if you can do it.

Mr. WILLIAMS. I merely wanted to point out that in *McKay v. Wahlenmaier*, in the Court of Appeals here, there was an outstanding lease and the suit was brought by a person claiming to be the first applicant, asking for the issuance of a lease to him and the cancellation of the outstanding lease. That is what you have here, except that he didn't ask for the cancellation——

Mr. WILSON. Of the Snyder lease.

Mr. WILLIAMS. Yes, that is right.

Mr. WILSON. No, because I would have had to make Snyder a party to that.

Mr. WILLIAMS. But I wanted to point out that in the *Wahlenmaier* case the District Court here did enter a judgment directing the Secretary of the Interior to cancel the outstanding lease and to issue a new lease to the person who established that he was the successful applicant.

I didn't think that was right at the time, but I say the Court of Appeals upheld that so I should think the Court would have jurisdiction to direct the cancellation.

The COURT. I take it you have practiced law in some states in addition to your practice here in the District. From your remark I would assume that you were considering the problem that came to my mind as I heard you state this case.

You have two leases of record in the state, and this Court has no authority to order the records of that state changed; the state is not a party here, and a cancellation of the lease will not do it.

Mr. WILLIAMS. No, it won't change the records.

The COURT. It won't change the records, and the records have to be changed, and they can be changed, in my view, only in two ways: By a grant from the holder of the lease or by an order of the state court having jurisdiction of that matter. A cancellation won't take that lease off the record.

Mr. WILLIAMS. No.

The COURT. Very well. Now I understood Mr. Browning to say that he would agree for his client to give whatever grant is necessary to correct that record if his client loses his contention in this case, provided your client will agree to do the same if it loses.

Mr. BROWNING. That's correct, Your Honor, with one caveat that occurs to me now.

One of the contentions that is being made by the plaintiff in this case does not go to the merit of who should have the lease at all. It goes only to the question of whether the cancellation should be judicial or administrative.

Now I think the position of the plaintiff is unsound because I think the statute that provides for judicial cancellation is applicable only to a default of a valid lease, and that is not what you have here at all.

But assuming that Your Honor should disagree, and should hold that only by judicial cancellation could the unauthorized Texas Company lease be removed from the record, and therefore the Secretary must be reversed, under those circumstances we still might be entitled to the lease but would still have to go to court to cancel it; so I would say it necessarily depends to that extent upon the nature of the judgment that is entered, and the basis for it, and I don't know whether we couldn't just flatly agree that if the decision here were adverse to us, which we do not anticipate, but if it were that we would agree to transfer our interest. Certainly if it affected the merits of who should have the lease in the final analysis, yes, we would.

Mr. WILSON. I want to say that we unqualifiedly agree to submit to the jurisdiction of Your Honor every question which can lead Your Honor to a result that one lease will survive and the other lease may not survive.

The COURT. Very well; and in that agreement you agree to execute whatever is necessary to correct the records in accordance with the judgment of the Court?

Mr. WILSON. Yes, sir.

The COURT. And you agree?

Mr. BROWNING. And we agree that except with the one condition that I indicated, if Your Honor does determine that The Texas Company on the merits should have the lease, and it's not just a question of whether it should be judicial or administrative cancellation, then we also will agree to execute whatever papers are necessary to clear the record.

The COURT. I was prompted to say what I did in an effort to make this litigation, including whatever appeal is taken, of course, final as to the controversy between these parties. They want to know who can go in and operate on that 40 acres, and as far as possible that should be made the issue here now, if it isn't, so that when this litigation is terminated Mr. Snyder or The Texas Company has the lease on the 40 acres.

Mr. BROWNING. That's certainly in our interest, sir. We have had a lease since May of 1953 and paying rentals on it and haven't got a drop of oil, so we are very interested to have it disposed of finally here.

Mr. WILSON. But you don't make an unqualified commitment. You say if the Court decides with us on the point that judicial recourse is the only way for the Secretary to cancel, but you don't commit yourself to the subsequent action.

Mr. BROWNING. Then of course it would be a question for the Secretary to go to court to cancel it, and the assumption would be that our lease was good but the Secretary just proceeded procedurally in the wrong manner.

Mr. WILSON. I am not criticizing you; I am just clarifying the point.

Mr. BROWNING. Yes, you properly stated it.

BRIEF FOR PATRICK A. McKENNA, AMICUS CURIAE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13636

FRED A. SEATON, Secretary of the Interior, *Appellant*,

v.

THE TEXAS COMPANY, A Corporation, *Appellee*.

and

No. 13637

JOHN SNYDER, *Appellant*,

v.

THE TEXAS COMPANY, A Corporation, *Appellee*.

United States Court of Appeals
For the
District of Columbia Circuit
FILED JAN - 2 1958
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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13636

FRED A. SEATON, Secretary of the Interior, *Appellant*,

v.

THE TEXAS COMPANY, A Corporation, *Appellee*.

and

No. 13637

JOHN SNYDER, *Appellant*,

v.

THE TEXAS COMPANY, A Corporation, *Appellee*.

BRIEF FOR PATRICK A. McKENNA, AMICUS CURIAE

Introduction.

Patrick A. McKenna, appellant of co-pending appeal No. 14,095, *McKenna v. Seaton and DeArmas* (not yet set for hearing), petitioned this Court for permission to appear as *amicus curiae* for limited purposes only; namely, to demonstrate:

First, that, contrary to the statement of the Secretary of the Interior (p. 17, Pet. Rehear., *Texas Company* case, *supra*) the issue involved in the *Texas Company* case is

not the "same issue * * * presented in * * * McKenna v. Seaton No. 14095"; and

Secondly, that, contrary to the Secretary's assertion in his unsuccessful motion to postpone hearing in *McKenna v. Seaton and DeArmas*, *supra*, the decision in the *Texas Company* case will not dispose of "the merits in" *McKenna v. Seaton and DeArmas*.

The Issues in McKenna v. Seaton and DeArmas Distinguished From Those in the Texas Company Case.

McKenna v. Seaton and DeArmas involves an original judicial proceeding in the District Court of the same nature as *McKay v. Wahlenmaier*, 226 F. 2d 35, 96 U. S. App. D. C. 313, to determine, in the Secretary's words (p. 3, Supp. Mem., *Texas Company* case, *supra*)

"whether an application by DeArmas for a non-competitive lease was, as claimed by McKenna, so defective"

as to render any lease to DeArmas

"invalid and to constitute McKenna the first qualified applicant."

McKenna v. Seaton and DeArmas is thus a judicial proceeding to require the Secretary to perform his statutory duty with regard to issuing a lease to the first qualified applicant; which duty he has tried to evade on the basis of an alleged change in the requirements of an admittedly mandatory duly promulgated regulation, supposedly effected by an unpublished, secret administrative "practice" which the Secretary himself has had to admit was "not legally justifiable".

The case of *McKenna v. Seaton and DeArmas*, therefore, does not involve at all the question of the Secretary's inherent power to cancel a lease.

It does not involve a complaint in the nature of mandamus alone, as in the *Texas Company* case, (Jt. App. 1a) praying for restoration of a purportedly cancelled lease as a ministerial duty upon the ground that such cancellation was of no legal effect.

The *Texas Company* case, moreover, as we read it, appears to involve a stipulation between the Texas Company and Snyder (Jt. App. 31A, 31B) to the effect that, if restoration of the purportedly cancelled lease is required upon the ground that the purported cancellation was not legally effective, the Court was distinctly *not* to construe the mandamus action as a more general complaint requesting an independent judicial proceeding to determine which party held the valid lease.

In *McKenna v. Seaton and DeArmas*, there is no such stipulation, and no such purported cancellation of a lease. The complaint, furthermore, as before stated, is of the same type as that involved in *McKay v. Wahlenmaier*, *supra*, and the same type of relief is sought.

There appears to be no dispute, moreover, between this Court, the appellee or the appellants in the *Texas Company* case, but that, under the type of action instituted in *McKay v. Wahlenmaier*, to quote the Secretary (p. 9, Pet. Rehear.)

“The Wahlenmaier case was correct * * *.”

Since *McKenna v. Seaton and DeArmas* is this same type of action, it follows that there can be no dispute but that this Court may grant McKenna whatever relief he has sought, irrespective of the disposition of the petition for rehearing in the *Texas Company* case.

No matter whether this Court maintains its present position in the *Texas Company* case, or whether it adopts the

Secretary's position, its ultimate decision in *McKenna v. Seaton and DeArmas* will remain unaffected.

It appears that this Court, indeed, has already appreciated this fact since, in response to McKenna's opposition to the Secretary's motion to postpone hearing in *McKenna v. Seaton and DeArmas* (which rested upon this very point), this Court denied the Secretary's motion.

Respectfully submitted,

SAMUEL NAKASIAN,
Washington, D. C.,

ROBERT H. RINES,
RINES AND RINES,
Boston, Massachusetts,
Attorneys for McKenna.

December 1957.

ANSWER OF APPELLEE TO APPELLANTS'
PETITION FOR REHEARING AND
HEARING EN BANC

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,636

FRED A. SEATON, SECRETARY OF THE INTERIOR, *Appellant*

v.

THE TEXAS COMPANY, A CORPORATION, *Appellee*

and

No. 13,637

JOHN SNYDER, *Appellant*

v.

THE TEXAS COMPANY, A CORPORATION, *Appellee*
United States Court of Appeals

For the

District of Columbia Circuit

FILED NOV 12 1957

Joseph W. Stewart

CLERK

WALTER E. WILL,
Of Counsel

November 12, 1957.

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13636

FRED A. SEATON, SECRETARY OF THE INTERIOR, *Appellant*

v.

THE TEXAS COMPANY, A CORPORATION, *Appellee*

and

No. 13637

JOHN SNYDER, *Appellant*

v.

THE TEXAS COMPANY, A CORPORATION, *Appellee*

**ANSWER OF APPELLEE TO APPELLANTS'
PETITION FOR REHEARING AND
HEARING EN BANC**

The Texas Company, appellee in the above cases, herewith presents its answer and objections to the petition of appellants for rehearing and hearing *en banc*.

The opinion of the Court dated October 3, 1957 (Judges Bazelon, Fahy and Burger) accurately sets forth the facts, which are not challenged in the petition for rehearing. Briefly, appellee's assignor, Dorrough, was the first qualified

applicant for an oil and gas lease of the forty acres in controversy. The lease which was actually issued to appellee erroneously described the land as acquired land. Appellant Snyder filed a later application and was subsequently issued a lease of the forty acres as land in the public domain. Upon the request of Snyder, appellee's lease was summarily cancelled without notice, although the matter was later reviewed by the Secretary. Appellee then filed this action in the District Court to nullify the purported cancellation of its lease. Snyder intervened and at the trial it was stipulated that the Court should determine which lease was valid and dispose of the entire controversy, unless its findings were based upon the lack of a judicial proceeding to cancel the lease. The District Court held for the appellee on the merits and ordered the restoration of appellee's lease and the cancellation of Snyder's lease. This decision came squarely within the terms of the stipulation. However, this Court held that the purported cancellation was ineffective because of the lack of a judicial proceeding, and accordingly affirmed as to the restoration of appellee's lease but, in view of the limitation in the stipulation, the Court refrained from deciding whether there was any right in appellant Seaton or appellant Snyder to have appellee's lease cancelled in a judicial proceeding.

The petition misconceives and misconstrues the decision and holding of the Court in several respects. The first point asserted in the petition is stated as follows: "*Neither the trial court nor this Court has discretion simply to refuse to decide a case properly before it:*" This heading does not accurately describe the action of the Court, which was to keep its decision within the scope of the stipulation of the parties in the court below. The restriction in the stipulation making it inapplicable if the decision was based upon lack of judicial proceeding was included at the request of appellant Snyder. If appellants Seaton and Snyder are willing to waive the restriction in this stipulation so

that a final decision can be made on this record, appellee would be agreeable to such an arrangement and would make a like waiver. The argument advanced in the petition upon this point would not seem to need any further comment.

The fundamental decision of the Court was that the Secretary had no reserved power to cancel the lease unilaterally as an administrative act by virtue of any provision of statute, or of any regulation or under the terms of the lease itself. Since the Secretary had apparent authority to issue the lease, the Court concluded that the lease could not be cancelled except in a judicial proceeding brought for that purpose, on recognized grounds for such cancellation. In reaching this conclusion, the Court relied on numerous decisions under the land patent statutes which the Court found to constitute an analogous situation. While appellants contend that the administrative problems with respect to leases are different from those in connection with the issuance of land patents, they have presented no decisions supporting their argument. Long ago in the famous *Kettleman Hills* case, District Judge Beaumont (Southern District, California, Central Division) in *United States v. General Petroleum Corporation*, 73 F. Supp. 225, 234, affirmed 184 F. 2d 802, in circumstances strongly favorable to the Government's claim, ruled "that the government's role is taken to be no different from that of any private lessor or proprietor", in seeking to cancel an oil and gas lease.

It is urged by appellee that the decision herein is in conflict with *McKay v. Wahlenmaier*, 96 U. S. App. D. C. 313, 226 F. 2d 35. In its decision in the instant case the Court pointed out that in that case "the cancellation was ordered by the Court as the result of a judicial proceeding, and not on review of administrative cancellation". The facts in that case showed that fraud, deception and concealment were present and constituted grounds for cancellation. In its opinion herein the Court said that the

Wahlenmaier decision "did not decide that administrative cancellation was available to the Secretary in the present case". The Secretary of the Interior has construed the *Wahlenmaier* decision to be of limited application. In *John C. DeArmas, Jr., P. A. McKenna*, A-27232, decided March 19, 1956 (not reported), the following comment was made concerning the *Wahlenmaier* decision:

"Furthermore, in the *Wahlenmaier* case the court found that the person to whom the lease was issued had unfairly and secretly attempted to gain an advantage over the other persons in the issuance of the lease, a factual situation which is not present here.

"Consequently, the *Wahlenmaier* case is distinguished from the supplemental *Hooper* decision and affords no reason for the Secretary to depart from his ruling in the latter."

Petitioners seem to argue that there is an established administrative practice of the Secretary "of correcting errors" by cancellation of oil leases. This argument is not based on anything in this record and seems to be contrary to the argument made in the *Wahlenmaier* case that the Secretary limited his "authority to cancel an oil and gas lease 'for reasons existing at the time of its issuance' which clearly show 'that the lease was obtained in contravention of some statutory provision or some regulation issued by the Department'" (*ibid*, p. 320). It was this argument that gave rise to the comment of the Court in its footnote 11 as follows: "We think the Secretary unduly restricted his own power of cancellation".

The Secretary has recognized limitations in his authority to cancel a lease of mineral lands. In the appeal of *L. N. Hagood*, A-25912, 60 I. D. 462 decided February 7, 1951, the Secretary held that the handling of the Hagood application "violated an established administrative practice in the Department, but that the issuance of the lease to Mr. Hagood did not violate any provision of the Mineral Leasing Act". Therefore, he ruled that there was no legal

basis for cancelling the Hagood lease. The opinion contains the following statement of principles:

“The Department’s power to cancel noncompetitive oil and gas leases after their issuance is limited. One proper basis for the cancellation of a lease is that the requirements of the statute governing the issuance of such leases have not been satisfied. *Russell Hunter Reay v. Gertrude H. Lackie*, A-24670 (August 2, 1947). A lease may also be cancelled if the lessee fails to comply with the provisions of the statute, the applicable regulations, or the terms of the lease, and such default continues after notice has been given (43 C.F.R. 192.161). However, none of these grounds for cancellation seems to be available in the present case”.

An administrative power of cancellation exists only when the lease is obviously void (not merely voidable) for failure to comply with some mandatory statutory requirement. This is not such a case.

Certainly it is beyond question that a lessee of public mineral lands acquires a property right of which he cannot be deprived except by the normal processes of law, and not a mere license that may be cancelled as the result of further administrative action. The Court summarized its decision in this significant language:

“In other words, in the circumstances here presented—and we do not deal with all possible situations—the ultimate rights and duties of the parties, including the United States, cannot be so molded initially by administrative corrective action as to be subject only to the limited judicial scrutiny applicable where an administrator acts within his sphere of discretion, as in *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U.S. 316, and like cases.”

Such a review can only be had in the courts. With respect to any attempted cancellation for violation of the provisions of a lease in a producing field, this Court many years ago held that a judicial proceeding was absolutely necessary,

Bell Oil & Gas Co. v. Wilbur, 60 App. D. C. 256, 257, 50 F. 2d 1070.

It is respectfully submitted that petitioners have failed to set forth any sound basis for rehearing or hearing *en banc*.

Respectfully submitted,

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